(5)

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

No. 99-1953

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
Petitioners,
v.
TRI COUNTY INDUSTRIES, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

ROBERT R. RIGSBY
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY
Senior Assistant
Corporation Counsel
Counsel of Record for Petitioners

FRANK J. EMIG
Greenway Center East
Suite 314
7525 Greenway Center Drive
Greenbelt, Maryland 20770-3525
Telephone: (301) 345-7002
Counsel of Record
for Respondent

Office of the Corporation Counsel
Government of the District of Columbia
One Judiciary Square – 6th Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252/724-5691

Petition for a Writ of Certiorari filed on June 2, 2000
Certiorari granted on September 26, 2000

163 pp
$8/0

TABLE OF CONTENTS

Page

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (January 18, 2000) 1

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. April 20, 1998) 11

Memorandum Order in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. July 23, 1998) 12

Judgment on the Verdict in *Tri County Industries, Inc. v. District of Columbia*, Civil Action No. 94-2014(JR) (D.D.C. February 4, 1999) 15

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (March 8, 2000) (denying petition for rehearing) 16

Order of the United States Court of Appeals for the District of Columbia Circuit in *Tri County Industries, Inc. v. District of Columbia*, No. 99-7028 (March 8, 2000) (denying petition for rehearing *en banc*) 17

JOINT APPENDIX

Relevant Docket Entries: *Tri County Industries, Inc. v. District of Columbia, et al.*, Civil Action No. 94-CV-2014 (D.D.C.) 1

Relevant Docket Entries: United States Court of Appeals for the District of Columbia Circuit, Appeal No. 99-7028 7

DE 45: Amended Complaint -- Excerpts 8

DE 43: Answer to Amended Complaint -- Excerpts . . . 9

DE 46: Memorandum Opinion (D.D.C. January 17, 1996) 10

Decision (D.C. Cir. January 14, 1997) 18

DE 67: Memorandum Opinion (July 25, 1997) 31

Trial Transcript & Exhibits, Civ. No. 94-CV-2014 (April 14-17, 1998) 35

Testimony of Karleen Donnells, Vice President of Tri County Industries 35
Testimony of John Wegznek, certified public accountant 38
Testimony of Glenn Selzer, President of Tri County Industries 39
Testimony of Jonathan L. Farmer, counsel for Tri County Industries 53
Testimony of Alfred Dishian, business consultant 55
Testimony of Donald G. Carter, consulting engineer 58
Testimony of Vincent DiRenzo, environmental consultant 60

Deposition Testimony of Larry Johnson 64
Testimony of Joel M. Morse, professor of financial economics 65
Deposition Testimony of Harry Thomas 70
Deposition Testimony of Hampton Cross 71
Deposition Testimony of Francine Howard James, Executive Officer, D.C. Board of Appeals and Review 72
Argument of Counsel 72
Ruling of Court on defendants' motion for judgment as a matter of law 77
Testimony of DCRA Inspector Juan Berra-yarza 80
Testimony of DCRA Inspector Phillip Thomas . 83
Testimony of DCRA Employee Lennox Simon . 85
Testimony of DCRA Director Hampton Cross . . 89
Testimony of DCRA Chief James Sweeney . . . 93
Testimony of BAR's Executive Officer Fran-cine James 103
Colloquy: Court and Counsel 104
Proposed Testimony of Alfred Siess 105
Colloquy: Court and Counsel 112
Colloquy: Court and Counsel 120
Defendants' renewal of their motion for judg-ment as a matter of law 120
Court directives to jury 122
Jury Instructions -- excerpts 123
Plaintiff's Exhibit 3 126
Plaintiff's Exhibit 4 130
Plaintiff's Exhibit 44 132
Plaintiff's Exhibit 54; D.E. 17 -- Exh. A . . . 133
Plaintiff's Exhibit 56 139
Plaintiff's Exhibit 57 143
Defendants' Exhibit 8 (October 15, 1993 letter) 145
Defendants' Exhibit 10 (December 6, 1993 letter) 148

Relevant Docket Entries

Tri County Industries, Inc. v. District of Columbia, *et al.*
Civil Action No. 94-CV-2014 (D.D.C.)

[TCI = Tri County Industries, Inc.]

9/20/94 -- DE 1: COMPLAINT filed by TCI; jury demand

10/17/94 -- DE 8: ANSWER TO COMPLAINT [1-1] by defendants DC, SHARON PRATT KELLY, DEPT. OF CONSUMER, HAMPTON CROSS, FERIAL BISHOP; jury demand

9/27/95 -- DE 28: ORDER by Judge James Robertson: granting motion for leave to file amended complaint [24-1] by TCI

9/27/95 -- DE 29: MOTION filed by TCI for summary judgment; exhibits (51)

9/27/95 -- DE 45: AMENDED COMPLAINT by TCI [1-1]; jury demand

10/25/95 -- DE 32: CROSS MOTIONS by defendants to dismiss, or, in the alternative for summary judgment; Exhibits (7)

12/5/95 -- DE 39: SUPPLEMENTAL MEMORANDUM by defendants in support of cross motion for summary judgment [32-2]

12/20/95 -- DE 43: ANSWER TO AMENDED COMPLAINT by defendants; jury demand

1/17/96 -- DE 46: MEMORANDUM OPINION by Judge James Robertson

1/17/96 -- DE 47: ORDER by Judge James Robertson: granting cross motion for summary judgment [32-2] by defendants with respect to Count I of the amended complaint; denying motion for partial summary judgment [29-1] by TCI dismissing Count II of the amended complaint for failure to state a claim upon which relief can be granted; declining to exercise supplemental jurisdiction over Counts III and IV of the amended complaint; dismissing complaint [1-1] with prejudice.

1/29/96 -- DE 49: NOTICE OF APPEAL by TCI from order dismissing complaint [1-1] with prejudice. [47-1], order [47-2], entered on January 17, 1996.

2/26/97 -- DE 52: CERTIFIED COPY of judgment filed in USCA dated 1/14/97 on appeal [49-1], vacating decision of USDC and remanding for further proceedings OPINION USCA # 96-7022

4/15/97 -- DE 56: MOTION by TCI to strike affirmative defense of failure to mitigate damages

4/15/97 -- DE 58: MOTION by TCI for summary judgment on the issue of failure to mitigate damages

5/23/97 -- DE 61: OPPOSITION by defendants to motion to strike affirmative defense of failure to mitigate damages

5/23/97 -- DE 62: OPPOSITION by defendants to motion for summary judgment on issue of failure to mitigate damages [58-1]

5/23/97 -- DE 63: MEMORANDUM by defendants on damages issues

5/30/97 -- DE 64: REPLY by TCI to defendants' memorandum on damages issues

5/30/97 -- DE 65: REPLY by TCI to defendants' opposition to TCI's motion for summary judgment on issue of failure to mitigate damages

5/30/97 -- DE 66: REPLY by TCI to defendants' opposition to motion to strike affirmative defense of failure to mitigate damages

7/25/97 -- DE 67: MEMORANDUM OPINION by Judge James Robertson

7/25/97 -- DE 68: ORDER by Judge James Robertson: denying motion for summary judgment on issue of failure to mitigate damages [58-1] by TCI; denying motion to strike affirmative defense of failure to mitigate damages [56-1] by TCI

12/11/97 -- DE 74: MOTION by TCI in limine to exclude testimony or argument involving the safety of TCI's project

12/11/97 -- DE 75: MOTION by TCI in limine to exclude stop work order dated September 22, 1993

12/11/97 -- DE 76 -- MOTION by TCI to amend ad damnum clause in amended complaint

12/11/97 -- DE 77: MOTION by TCI in limine to exclude defense of failure to mitigate damages

12/16/97 -- DE 79: MOTION by defendants for summary judgment on damages; exhibits (4)

12/17/97 -- DE 80: MEMORANDUM in support of defendants' motion for summary judgment on damages [79-1]; exhibits (5)

12/31/97 -- DE 82: OPPOSITION by defendants to motion to exclude testimony or argument involving safety of TCI's project [74-1]

12/31/97 -- DE 83: OPPOSITION by defendants to motion to exclude stop work order dated September 22, 1993 [75-1]

1/6/98 -- DE 84: SUPPLEMENTAL MEMORANDUM by defendants in support of opposition [82-1]

1/8/98 -- DE 85: REPLY by TCI to defendants' opposition to motion to exclude testimony or argument involving the safety of TCI's project

1/9/98 -- DE 86: REPLY by TCI to defendants' opposition to motion to exclude stop work order dated September 22, 1993

1/15/98 -- DE 87: OPPOSITION by TCI to defendants' motion for summary judgment on damages [79-1]

2/4/98 -- DE 89: REPLY by defendants to TCI's opposition to motion for summary judgment on damages [79-1]

3/4/98 -- DE 91: MEMORANDUM AND ORDER by Judge James Robertson: denying motion of defendants for summary judgment on damages [79-1]; denying motion to exclude defense of failure to mitigate damages [77-1] by TCI; granting motion by TCI to amend ad damnum clause [76-1]; denying motion by TCI to exclude stop work order dated September 22, 1993; denying

motion by TCI to exclude testimony or argument involving safety of TCI's project [74-1]

3/17/98 -- DE 94: PRETRIAL STATEMENT by TCI; exhibits (4)

3/17/98 -- DE 95: MEMORANDUM (Pretrial) by TCI on damages and duty to mitigate damages

3/25/98 -- DE 98: PRETRIAL STATEMENT by defendants

3/27/98 -- DE 99: MOTION by TCI to preclude factual witnesses from testifying

3/31/98 -- DE 101: OBJECTIONS by TCI to defendants' proposed exhibits

4/6/98 -- DE 102: OPPOSITION by defendants to TCI's motion to preclude factual witnesses from testifying [99-1]

4/7/98 -- DE 103: OBJECTIONS by defendants to TCI's exhibit list

4/14/98 -- JURY TRIAL before Judge James Robertson: jury of 8 sworn and selected; trial begun

4/15/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed

4/16/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed

4/17/98 -- JURY TRIAL before Judge James Robertson: same jury of 8 resumed and concluded; Jury deliberations began and concluded; Judgment in favor of plaintiff in the amount of $5,000,000.00;

notes (1) and verdict form filed in court jacket.

4/17/98 -- DE 106: VERDICT FORM
4/17/98 -- DE 107: JURY INSTRUCTIONS

4/20/98 -- DE 104: JUDGMENT on Verdict in favor of TCI against defendant DC in the amount of $5,000,000.00

4/27/98 -- DE 111: TRANSCRIPT of trial for 4/14/98
4/27/98 -- DE 112: TRANSCRIPT of trial for 4/16/98
4/27/98 -- DE 113: TRANSCRIPT of trial for 4/15/98
4/27/98 -- DE 114: TRANSCRIPT of trial for 4/17/98

5/4/98 -- DE 115: MOTION by defendants for judgment notwithstanding the verdict or, in the alternative, for a new trial

5/18/98 -- DE 116: OPPOSITION by TCI to motion [115-2]

6/4/98 -- DE 118: SUPPLEMENTAL MEMORANDUM by TCI in opposition to motion [115-2]

6/16/98 -- DE 120: SUPPLEMENTAL MEMORANDUM by defendants in support of their motion for new trial [115-2]

7/23/98 -- DE 124: MEMORANDUM AND ORDER by Judge James Robertson: granting motion for new trial [115-2] unless within 30 days after entry of this order, TCI accepts remittitur of jury's verdict to $1,000,000

8/24/98 -- DE 125: RESPONSE by TCI to offer of remittitur

12/8/98 -- DE 132: MOTION by TCI for reconsideration of the 7/23/98 order [124-1]

2/4/99 -- DE 155: JUDGMENT on verdict in favor of plaintiff TCI in the nominal amount of $100.00

2/23/99 -- DE 158: NOTICE OF APPEAL by plaintiff TCI from judgment order [155-1] entered on: February 4, 1999.

Relevant Docket Entries

United States Court of Appeals
for the District of Columbia Circuit
Appeal No. 99-7028

6/28/99 -- BRIEF filed by Appellant, Tri County Industries, Inc.
8/12/99 -- BRIEF filed by Appellees, District of Columbia, et al.
8/26/99 -- REPLY BRIEF filed by Appellant
11/12/99 -- ORAL ARGUMENT HELD before Edwards, Silberman, Henderson
11/18/99 -- LETTER filed by counsel for Appellees in response to questions raised at oral argument
11/22/99 -- LETTER filed by Appellant in response to Appellees' 11/18/99 letter
11/23/99 -- LETTER filed by Appellees in reply to Appellant's 11/22/99 letter
1/18/00 -- JUDGMENT for the reasons stated in the accompanying opinion
1/18/00 -- OPINION for the Court filed by Judge Henderson
2/17/00 -- PETITION for rehearing and PETITION for rehearing en banc filed by Appellees
3/8/00 -- PER CURIAM ORDER, In Banc, denying petition for rehearing en banc
3/8/00 -- PER CURIAM ORDER filed denying petition for rehearing

[DE 45: AMENDED COMPLAINT -- EXCERPTS]:

AMENDED COMPLAINT

(For Damages -- Violations of Constitutional Rights to Due Process; Unconstitutional Impairment of Contracts; Tortious Interference with Contracts; Tortious Interference with Prospective Economic Advantage)

* * *

11. On information and belief, various other entities and individuals, not made Defendants herein, whose identities or conduct are presently unknown to the Plaintiff, have participated with Defendants in the violations and tortious actions alleged herein and have performed acts and made statements in furtherance thereof.

12. In July, 1992, the Plaintiff initially made application with DCRA to obtain all required permits to operate a soil remediation facility at 2115 Bryant Street, N.E.

13. This facility was designed to treat and clean soil that had been contaminated with gasoline, diesel oil, fuel oil and kerosene. It was not intended to treat any hazardous waste material.

14. DCRA conducted an extensive review of the Plaintiff's application to construct and operate this facility, including, but not limited to visits to this site. Such review resulted in the Environmental Regulation Administration issuing to the Plaintiff on December 11, 1992, an air quality operating permit for this project. On December 22, 1992, the same Administration further approved the project to proceed without the filing of an environmental impact statement.

[DE 43 -- ANSWER TO THE AMENDED COMPLAINT -- EXCERPTS]:

ANSWER OF DEFENDANTS TO THE AMENDED COMPLAINT

* * *

11. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph "11."

12. Defendants admit the allegations stated in paragraph "12."

13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph "13."

14. Defendants admit the allegations stated in the first sentence of paragraph "14", and deny those stated in the second sentence therein.

[DE 46 – MEMORANDUM]:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRI-COUNTY INDUSTRIES, INC.	:	
Plaintiff,	:	
v.	:	Civil Action No.
	:	94-2014 (JR)
DISTRICT OF COLUMBIA, *et al.*,	:	**FILED**
Defendants.	:	JAN 17 1996

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiff Tri-County Industries, Inc., a Maryland corporation in the business of removing underground fuel storage tanks and remediating contaminated soil, alleges that the District of Columbia, and various of its agents acting in their official capacities, illegally suspended the building permit and air quality permit issued to Tri County for the construction of a soil remediation facility. Tri-County asserts claims under 42 U.S.C. § 1983 for violation of its due process rights and for unconstitutional impairment of contract. Tri-County also asserts common law claims. Before the Court are Tri-County's motion for partial summary judgment and the motion of defendants to dismiss or for summary judgment.

I. Background.

In July 1992, Tri-County applied to D.C.'s Department of Consumer and Regulatory Affairs (DCRA) for the permits necessary to build and operate a new soil remediation facility at 2215 Bryant Street, N.E.[1] On December 11 of the same year, DCRA's Environmental Regulation Administration (ERA) issued an air quality operating permit that was to be

valid upon the issuance of a building permit. On December 22, ERA notified Tri-County that the soil remediation project could proceed without the filing of an environmental impact statement, but that the "project is still governed by all other applicable District and Federal laws and regulations and will be subject to normal reviews during the permitting and construction process." On February 26, 1993, DCRA issued building permit No. B378978, permitting Tri-County to renovate a warehouse to accommodate the soil remediation plant.

On September 7, 1993, when the warehouse renovation work was in progress and Tri-County was awaiting the delivery of its soil remediation equipment, ERA issued a citation charging Tri-County with occupying the site as a soil remediation facility -- storing 500 tons of contaminated soil at the site -- without a certificate of occupancy. The citation required payment of a $500 fine within fifteen days. Tri-County did not pay the fine.

On September 20, 1993, representatives of Tri-County, DCRA, and D.C.'s Department of Housing and Community Development (DHCD), D.C. Councilmember Harry T. Thomas, and some 100 to 200 citizens attended a community meeting called by neighbors of the Bryant Street site to protest the location of the soil remediation facility in their neighborhood. During the meeting, Merrick Malone, a representative of DHCD, stated his agency's concerns about the facility's location, in view of the number of existing neighborhood residents and DHCD's plans to locate a new housing project nearby. After hearing that concern and others stated at the meeting, Hampton Cross, then acting director of DCRA, announced that his agency would re-evaluate the potential environmental impact of the soil remediation project on the

community and that Tri-County's permit would be suspended pending the re-evaluation.

Two days later, on September 22, DCRA posted a "stop work order" at the plant site.[2] On October 15, DCRA sent a letter to Tri-County requesting more information about the proposed plant and its potential environmental impact on the community. Tri-County did not respond.

On December 6, having received no response from Tri-County, DCRA rescinded the air quality permit and environmental approval letter issued on December 11 and December 22, 1992. DCRA also notified Tri-County that it would move to revoke the building permit (after procedures and a hearing in accordance with local law), and that Tri-County must immediately remove all contaminated soils from the site.

Tri-County sought no relief from the suspension of the building permit on September 20, or the stop work order of September 22, or the DCRA request for more information on October 15, or the rescission and revocation actions of December 6. Nor did Tri-County seek administrative or judicial review of any of these actions. Instead, Tri-County takes the position today that the September 20, 1993, suspension rendered the project economically unfeasible. Tri-County filed this action on September 20, 1994.

II. Due Process

The complaint alleges that defendants' September 20 suspension of the building permit and its December 6 rescission of the environmental approval violated the procedural and substantive due process guarantees of the United States Constitution. The undisputed facts provide no support for those

allegations, however, and defendants are entitled to summary judgment on plaintiff's due process claims.

a. Substantive due process

Neither the Supreme Court nor the Court of Appeals for this Circuit has enunciated an objective standard for deciding which governmental lapses are substantive due process violations redressable under 42 U.S.C. § 1983. The Court of Appeals has said, however, that "a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities" and that "only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights qualifies for protection under § 1983." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). Moreover, "inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." *Id.* The *Silverman* court cited with approval a First Circuit decision holding that "purposeful, malicious action" is a prerequisite to a substantive due process claim. *See Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 103 (1st Cir. 1977).

Applying those tests to the undisputed facts of this case requires a finding that Tri-County's substantive due process rights were not violated by the District's action. The 500 tons of contaminated soil found at the construction site led to the issuance of a civil citation to Tri-County on September 7. That violation alone, under D.C. law, triggered Director Cross's discretionary authority to revoke plaintiff's building permit summarily, if he determined that the infraction posed a threat to the health and safety of the District's citizens and had not been remedied in the time allotted. *See* D.C. Con-

struction Code § 112.9(3) (1992 Supp.). Even if Director Cross incorrectly assessed the danger to area residents or miscalculated the time within which Tri-County should remove the soil, the temporary suspension of the building permit -- which was not a revocation -- was at most negligent. Director Cross's conduct was not the substantial and malicious infringement of District law that is the stuff of a due process violation.

DCRA's subsequent rescission of Tri-County's environmental approval on December 6 was justified by Tri-County's failure to deal with the civil citation or to address the September 22 stop work order and its further refusal to respond to DCRA's October 15 request for information. *See* D.C. Environmental Policy Act of 1989, D.C. Code § 6-981 et seq. (1995 repl.). Again, even if this decision was in error, it was at most negligent and did not amount to a denial of Tri-County's substantive due process rights.

b. Procedural due process

Tri-County also complains that the guarantee of procedural due process was denied by Director Cross's impromptu suspension of its building permit without notice and a pre-suspension hearing.

The contours of procedural due process are flexible and depend upon the circumstances of a given case. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). At bottom, due process requires some kind of notice and a hearing before the *final* deprivation of a property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991). Interim suspensions of licenses and temporary seizures of property may be undertaken without a pre-deprivation hearing, provid-

ed that there is a sufficient factual basis for the action and that prompt administrative or judicial review of the merits of the decision is available. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Cokinos v. District of Columbia*, 728 F.2d 502 (D.C. Cir. 1983).

The suspension announced by Director Cross at the September 20, community meeting was not a "final deprivation" of Tri-County's asserted property interest in the building permit. Rather, it was akin to the "interim suspension" reviewed in *Barry v. Barchi, supra*. What Director Cross said on September 20 was that he would suspend the permit pending further study of the project's potential environmental impact. Formal action to revoke the permit did not begin until December 6, after Tri County failed to respond to DCRA's request for information.

I find on the basis of the undisputed facts both (1) that Director Cross had sufficient grounds upon which to impose an interim suspension for the purpose of gathering further information about the project's environmental impact on the surrounding community, and (2) that Tri-County had adequate post-deprivation remedies at its disposal with which to fight the permit suspension.

It is undisputed that Tri-County was cited for storing some 500 tons of contaminated soil at the Bryant Street facility two weeks prior to the suspension and that Tri-County neither removed the soil nor otherwise responded to the citation prior to the issuance of the stop work order on September 22. Tri-County's history of noncompliance with District environmental, building and zoning laws, the illegal presence of contaminated soil at the site, and the concerns about life safety raised by DHCD were enough for Director Cross, after consultation with his staff, to decide that more

information was needed. "At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements." *Barchi*, 443 U.S. at 65.

Tri-County could have sought, but did not seek, an expedited administrative hearing within 72 hours of the suspension. At such a hearing, the burden of justifying the suspension would have been the Director's. D.C. Code § 6-2706 (1995 repl.); D.C. Construction Code § 112.13 (1992 Supp.). If the result of the expedited hearing had been adverse to Tri-County, Tri-County had the right to a review before the D.C. Board of Appeals and Review. D.C. Construction Code § 112.14. Tri-County also could have sought, but did not seek, direct review of the suspension in the D.C. Court of Appeals pursuant to D.C. Code § 1-1510. And Tri-County could have sued, but did not sue, for injunctive relief in D.C. Superior Court or petition for a writ of mandamus in the D.C. Court of Appeals.

Tri-County's failure to pursue any of the post-suspension remedies available to it give a hollow ring to its allegations of injury. Even if Director Cross's decision to suspend the permit was not adequately grounded, Tri-County offers no evidence that the passage of a few days -- the amount of time deeded for the first level of administrative review -- resulted in any of the losses alleged in the complaint. Tri-County's alleged injury from the September 20 suspension was *de minimis* if not ephemeral.

III. The Remaining Claims

Tri-County has not developed or argued the claim for unconstitutional impairment of contract that was set forth in its amended complaint, and in that complaint Tri-County did not

allege the existence of any contractual relationship with which the District interfered. Rather, the impairment claim as stated relates only to *prospective* contractual relations -- and interference with prospective business advantage is not a constitutional tort. Accordingly, Count II must be dismissed for failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).

Having decided to dismiss all the claims over which I have original jurisdiction, I decline to exercise supplemental jurisdiction over plaintiff's common law claims of tortious interference with contract and interference with prospective business advantage. 28 U.S.C. § 1367(c).

An appropriate order is issued with this memorandum.

---

[1]During the previous year, under the name of Clean Earth, Inc., Tri-County had operated a soil remediation facility at 1911 New York Avenue, N.E. Tri-County closed that operation, however, after it was found in violation of city zoning laws.

[2]The basis and the import of the stop work order are disputed. Tri-County maintains that it was issued because of its failure to pay the fine that was due fifteen days after September 7 and points to the notation of "no c of o" on the face of the order -- presumably "no certificate of occupancy," which had been the basis for the September 7 citation. Defendants, on the other hand, argue that the stop work order implemented Mr. Cross's announcement at the September 20 meeting that he was temporarily suspending Tri-County's building permit.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 10, 1996 Decided January 14, 1997

No. 96-7022

ORIGINAL

TRI COUNTY INDUSTRIES, INC., A MARYLAND CORPORATION,
APPELLANT

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED JAN 14 1997

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv02014)

Frank J. Emig argued the cause and filed the briefs for appellant.

Martin B. White, Assistant Corporation Counsel, argued the cause for appellees. *Charles F.C. Ruff*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Assistant Deputy Corporation Counsel, were on the brief with him.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS, *Chief Judge*, WILLIAMS and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: On September 20, 1993 the acting director of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Hampton Cross, summarily and without a hearing suspended a building permit issued to Tri County Industries, Inc. Tri County contends that the suspension deprived it of its property without due process of law, in violation of the Fifth Amendment. Although we reject its "substantive due process" claim, we agree that the suspension violated Tri County's procedural rights.

* * *

Tri County is in the business of decontaminating soil tainted with oil and other hazardous materials. In July 1992 it applied to the District of Columbia government for a building permit to convert an empty warehouse in Washington, D.C. into a facility for its decontamination work. In pursuing the application, it sought and obtained both an air quality permit and a waiver of the requirement that it file an environmental impact statement. Both were prerequisites to the issuance of Tri County's building permit. See District of Columbia Municipal Regulations §§ 20-200.1, 20-7200.1.

On February 26, 1993 the DCRA issued the building permit. Its licensing in place, Tri County completed some work renovating the facility, but nearly six months later was not yet ready to begin operations, primarily because of delays in the delivery of the decontaminating equipment. On September 7 it was issued a citation for storing soil at the facility without the required certificate of occupancy.

In the meantime, public opposition to the project had grown. On September 20, 1993 D.C. officials held a public meeting, attended by residents of the nearby community, representatives of Tri County, Hampton Cross of the DCRA, and one Merrick Malone, a representative of D.C.'s Department of Housing and Community Development. The meeting

was by all accounts a loud and sometimes unruly affair. In the course of it Malone stated, incorrectly as it later turned out, that a new public housing project was to be built immediately adjacent to the facility. Cross thereupon stated that he was suspending Tri County's building permit, to the applause of the crowd. According to his later testimony, he acted on the basis of Malone's statement. This suspension, Tri County contends, also suspended its air quality permit.

Two days later, on September 22, Tri County was issued a stop work order for continuing operations without a certificate of occupancy in violation of the September 7 citation. Tri County took no action to challenge either the September 20 suspension, which all parties now agree had no legal basis at all, or the stop work order, which is not challenged here and which all agree was a legally sufficient bar to Tri County's continuing work on the facility. See District of Columbia Municipal Regulations § 12–118.0.

More trouble followed. On October 15, 1993, Tri County was sent a letter by an official working for Cross requesting additional information on the environmental effects of the project. This request was also of dubious legal authority. Although it cited authorization from § 4(c)(3)(C) of the District's Environmental Policy Act (D.C. Code § 6–983(c)(3)(C)), the review process referenced in that section presumably had ended when the waiver was granted. In any case, Tri County had already answered many of the same questions as part of that original review process. Tri County did not respond. On December 6, Cross sent another letter, again without clear basis in the D.C. Code, rescinding the environmental waiver and stating that the District would soon start proceedings to revoke the building permit. In fact it appears that the District never did start the revocation proceedings. (In all probability the permit would have expired by now as a result of the permittee's abandonment of the authorized work. See District of Columbia Municipal Regulations § 12–112.8.) Tri County did nothing in response to this last missive except to remove the soil that had been the basis of the September 7 citation.

One year to the day after the fateful public meeting, Tri County filed suit in federal court under 42 U.S.C. § 1983, alleging deprivation of its property without procedural or substantive due process. It identifies as deprivations not only the suspension of its building permit on September 20, 1993 but also the implied simultaneous suspension of its air quality permit on the same date and the explicit rescission of its environmental waiver on December 6, 1993.

The district court granted the District's motion for summary judgment. It rejected the substantive due process claim on the ground that Cross's actions were at most negligent and the procedural due process claim on the ground that the building permit suspension was only an "interim suspension" for which Cross had "sufficient factual basis" and for which prompt review was available, citing *Barry v. Barchi*, 443 U.S. 55, 64 (1979). See *Tri-County Industries, Inc. v. District of Columbia*, 932 F. Supp. 4, 6, 7 (D.D.C. 1996). We review de novo. See *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995).

* * *

We first dispose of Tri County's claim that the implied suspension of the air quality permit on September 20, and the explicit rescission the environmental waiver on December 6, were deprivations that require our review. As to the air quality permit, the only ground for regarding it as suspended at all is the idea that it was joined at the hip with the building permit, so that the suspension of the building permit equally suspended the air quality permit. That may well be true: the letter issuing the permit says that it will not become valid (as authorization for a stationary source of air pollution) until a valid building permit is received by the issuing office. See letter of December 11, 1992 to Tri County from the Environmental Regulation Administration of the DCRA. But it would seem to follow that reactivation of the building permit would reactivate the air quality permit. Accordingly, it is hard to see how the latter's suspension adds anything to that of the building permit.

Of course the air quality suspension might generate an additional issue *if* the District defended the suspension (if indeed there was a suspension) as an application of procedures explicitly laid out for suspension of air quality permits; in that event we would be called on to review the constitutionality of the specified procedures. But the District makes no such claim. Rather, as we discuss in detail below, since the suspension of both permits did not fit any *authorized* procedure, we evaluate Cross's act, for procedural due process purposes, by inferring a hypothetical procedure from his actual conduct. That conduct was, of course, identical for both permits. Accordingly, the air quality permit seems to add nothing to the case that is not encompassed in analysis of the building permit.

Tri County's attack on the rescission of the environmental waiver fails for a different reason. While the air quality permit is legally stated as a prerequisite to construction and operation of a major stationary source (apart from the need for a building permit), the waiver is merely a step towards the acquisition of the building permit. District law requires that the environmental impact of a "major action" be evaluated "before an agency shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement" approving the action. See District of Columbia Municipal Regulations § 20–7200.1. The waiver was simply an administrative finding that no more was required by way of satisfying that requirement for issuance of the building permit. But the due process clauses (here, that of the 5th Amendment, see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)) protect persons only against deprivations of life, liberty or property. While satisfaction of each of the many steps toward issuance of a building permit (conceded by the District to be a property right) is undoubtedly a useful milestone, Tri County offers no authority for the proposition that an agency "deprives" an applicant of "property" whenever it backtracks on a prior favorable finding on one of those steps, independently of withdrawal of the permit itself.

* * *

"Substantive" due process

Tri County's substantive due process claim is not crystal clear. In part the argument appears to be that the District's conduct was a taking of its property, unconstitutional because it was without just compensation. Tri County says that the District's "illegal and improper actions" inflicted "financial losses and delays" which in turn forced Tri County to abandon its plans and rendered the project "worthless." See Amended Complaint at 22. As to this claim, the District's ripeness defense is clearly sound. Under *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), a plaintiff advancing a claim for just compensation under the Taking Clause must have pursued its administrative remedies far enough to establish conclusively the effect of the regulations; only then can the court determine whether the impact has been draconian enough to make out a taking without just compensation. *Id.* at 186–97. As Cross's ukase of September 20, 1993 purported only to *suspend* Tri County's permit, and Tri County sought no relief, it cannot be said to have met this requirement.[1]

Alternatively Tri County appears to be invoking the more nebulous branch of substantive due process, which in our circuit requires the plaintiff to show "grave unfairness" by state (or District) officials. See *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988). There is some authority under which the very closeness of this claim to the taking argument might be a ground for rejecting it. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion

[1] Insofar as a suit for damages for a regulation that "goes too far" to be a permissible exercise of the police power is analytically distinguishable from a suit for failure to supply just compensation, see *Williamson*, 473 U.S. at 197, a failure to establish the impact of the suspension is similarly fatal, *id.* at 198–200. Finally, there is no claim for a "temporary taking." See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 318 (1987).

of 'substantive due process' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (plurality opinion of Rehnquist, C.J.). But in this circuit at least, under *Silverman*, the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition. See also *Albright*, 510 U.S. at 286–87 (Souter, J., concurring) (noting that the Court has rejected the proposition that "the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure)"). We thus turn to the District's ripeness defense to the *Silverman* claim.

We identified in *Silverman* two ways in which a plaintiff might show the "grave unfairness" that it requires. "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief . . ." 845 F.2d at 1080. A mere state law violation does not give rise to a substantive due process violation, although "the manner in which the violation occurs as well as its consequences are crucial factors to be considered." *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 944 (D.C. Cir. 1988).

Thus, both types of "substantive" due process under *Silverman* have a substantiality requirement built in—unlike procedural due process, under which there may be recovery even for nominal damages. See *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978). This requirement is obvious enough in the first formulation—"a substantial infringement. . . ." And we think it implicit in the second as well. Theoretically, the reference to "trammel[ling] significant personal or property rights" might embrace trivial trammelling of an important property right, but we think our clear intent in *Silverman* was to confine the concept of substantive due process, itself oxymoronic, see *Gosnell v. City of Troy*, 59 F.3d 654, 656 (7th Cir. 1995), to actions that in their totality are genuinely drastic. Although *Williamson* addressed only taking claims,

its logic appears to us ordinarily to apply to *Silverman*-esque invocations of the due process clause: unless the victim of government imposition has pushed its local remedies to the hilt, it ordinarily will not be able to show the necessary substantiality. Given that on its face the order of September 20 was only a suspension, and that Tri County failed to pursue its apparent remedy under District of Columbia Municipal Regulations § 12–123.0 (allowing appeal of agency action within a department and then to Board of Appeals and Review), the claim must fail either for want of ripeness or on the merits.

We thus affirm the district court's dismissal of the substantive due process claim.

Procedural due process

We turn next to the procedural due process claim. Section 1983 explicitly treats the District of Columbia as a state, and there is no doubt that Hampton Cross acted "under color" of District law when he suspended Tri County's building permit. As noted above, the District concedes that the permit was a property right.

The district judge believed that Cross's act did not violate the due process cause because it was a mere "interim suspension," for which Cross had a "sufficient factual basis" and for which prompt review was available. *Tri-County Industries*, 932 F. Supp at 7. We disagree on the adequacy of Cross's grounds, but, more pertinently, the central issue is the adequacy not of his facts but of the *process* that he purported to follow.

The District acknowledges that the D.C. Code makes no provision at all for oral orders of suspension. So far as suspension itself is concerned, it points to District of Columbia Municipal Regulations § 12–118.1, which allows stop work orders in the event that work on a structure is being performed contrary to code or "in an unsafe and dangerous manner." Assuming that Cross's act could be equated with a stop work order (such as was issued two days later), the District's classification here would still not be pertinent.

Cross never claimed to have issued his pronouncement because of defects in the manner of Tri County's construction—and the sequence of events at the public meeting would have undercut any such claim. Rather, Cross candidly rested his suspension on Malone's statement that a public housing project would be built adjacent to Tri County's site. The District does not even suggest to us that there was some procedure for summary suspension based on word of such a prospect.

Given this total deficiency, one might expect the District to defend the due process claim on the theory that Cross's act was "random and unauthorized." See *Parratt v. Taylor*, 451 U.S. 527, 541 (1981). Because the losses from such an act are not the result of any state procedure, and because the state cannot predict when such losses will occur, such acts are not violations of the due process clause so long as there is an adequate post-deprivation remedy. *Id.* at 541–42; see also *Doe v. District of Columbia*, 93 F.3d 861, 868–69 (D.C. Cir. 1996).

In this case, however, the District has not only failed to argue *Parratt* but has explicitly thrown the point away, "assum[ing], for purposes of this appeal, that the doctrine of *Parratt* ... does not apply to actions by the Director of a government agency acting within the general scope of his authority." In fact, there is a circuit split on this issue. Compare *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir. 1990) (en banc) (*Parratt* does apply to actions of high officials); *id.* at 1408–10 (Easterbrook, J., concurring), with *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc) (*Parratt* does not apply). It being inappropriate for us to resolve this sharply contested issue in a case where the parties appear to resolutely agree, we do not take that approach.

Evaluation of the adequacy of pre-deprivation procedures is governed by the balancing test stated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first step, of course, is to identify the procedure, a matter normally accomplished by looking at state (or District) law. In the case of a random and unauthorized act, however, there is, by definition, no

explicitly articulated procedure. Accordingly, the procedure must be reverse engineered from the official's act—how might a procedure authorizing such an act have been stated? (An advantage of the view that *Parratt* applies even to the acts of high officials is that it renders this construction project unnecessary.)

Here Cross acted on the basis of an assertion by another government official, made at a public meeting attended by the representatives of the permit holder, that at some time in the indefinite future there would be a greater population than had formerly been expected near the site; thus more people were likely to be affected by whatever air pollution the project would emit once it was constructed and operational. He had no formal evidence before him suggesting that the calculations on which his own agency had relied in issuing both the environmental waiver and the air quality permit were unsound, with or without regard to the new (mis)information about the supposed increase in the population affected. Even summarizing this "procedure" most favorably to the District, it appears to permit indefinite suspension of a building permit on the basis of information about greater adverse impacts than projected at the time the permit was issued, expected to occur several years in the future, without any factual basis for believing that the information, if true, would justify revocation of the permit.

But to call the suspension "indefinite" requires another step—consideration of the speed of any post-deprivation hearing and possible correction. See *Barry v. Barchi*, 443 U.S. at 61, 66 (suspension of horse trainer's license without pre-deprivation hearing unconstitutional because neither rule nor practice applied to trainer assured timely post-deprivation hearing); *Cokinos v. District of Columbia*, 728 F.2d 502, 503 (D.C. Cir. 1983) (car towing without pre-deprivation hearing valid in light of assurance of prompt post-deprivation hearing).

The District appears to provide two ways to appeal a suspension by the Director. The first is District of Columbia Municipal Regulations § 12–112.13, but the subsection enti-

tling a permit holder to an "expedited hearing" is available only for a permit *revocation* under § 12–112.9.3. Alternatively, Tri County could have sought to have the Director himself review his illegal act under District of Columbia Municipal Regulations § 12–123.1.2, which requires that an official within the DCRA review actions against a permit holder within three days and that the Director review any decision by that official within another three days. Given that the reviewing official under both provisions would have been Cross himself, and that the rules appear to specify no minimum procedural entitlement for the aggrieved permit holder, these procedures do not advance the ball. Finally, however, Tri County could have appealed to the Board of Appeals and Review, which may provide a "hearing." See *id.* §§ 123.2, 123.3. Pending ultimate decision, the Board could have issued a stay of the Director's order, but there appears to be no assurance that any such stay would be issued promptly. See *id.* § 5–503.5–12. In short, then, there is provision for correction of the sort of suspension issued by Cross, but uncertainty as to its likely speed.

We evaluate these procedures under the tripartite test of *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

The property interest here—the entitlement to continue construction without unfair interference—is substantial; any interruption of construction is likely to be very costly. It might be claimed in favor of the District that the holder of a permit would not want to pour money into a project during the course of more thorough procedures, if revocation were at all likely. But that is a calculation that the permit-holder

would want to make for itself, balancing the costs of interruption against the costs of spending that may prove fruitless. While the harm is mitigated by assurance of higher-level review, the absence of time limits leaves the degree of mitigation in doubt.

The risk of erroneous deprivation is high. It is in principle reduced by the official character of Cross's informant (Malone was speaking of matters in his agency's jurisdiction) and by the presence of Tri County's representatives. Even so, the gaps were substantial. Cross's own department had conducted an elaborate review of the air quality impacts of Tri County's project. Assuming the full truth of Malone's statement about the housing project, Cross so far as appears pursued no procedure at all to assess whether the alleged change in circumstances materially undermined his agency's prior finding. Thus, although the "procedure" applied was not formally ex parte, it was a classic case of shooting from the hip on complex technical matters. It is a safe understatement to say that modest improvements in procedure—even rudimentary ones for testing the relationship between the new claims and the previously established facts—had a high probability of reducing the risk of error.

Finally, the government interest in swift action was negligible. Assuming the unbuilt housing project was ever to be built, or that the air pollution from Tri County might affect its residents materially, there was no gain whatever in halting construction a few days sooner than could have occurred if Cross had afforded Tri County an opportunity for testing his assumptions. Cross's "procedure" thus deprived Tri County of property without due process of law.

This conclusion is not affected by the uncertainties arising from Tri County's failure to contest either Cross's suspension or the stop work order. A violation of procedural due process may occur even if the damages are only nominal, see *Carey v. Piphus*, 435 U.S. at 266–67, and one pursuing a procedural due process claim need not exhaust his local remedies, see *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). In calculating any damages, however, both the possibility of relief from the District's Board of Appeals and Review, as

well as the possible mooting effect of the stop work order, may be pertinent.

Thus, finding Tri County's procedural due process rights violated by Cross's suspension of the building permit, we vacate the judgment and remand the case to the district court to consider the extent of Tri County's damages.

So ordered.

[DE 67 – MEMORANDUM]:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRI-COUNTY INDUSTRIES, INC.	:	
Plaintiff,	:	
v.	:	Civil Action No.
	:	94-2014 (JR)
DISTRICT OF COLUMBIA, *et al.*,	:	**FILED**
Defendants.	:	JUL 25 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiff seeks compensation for the District of Columbia's unlawful suspension of a building permit that had been previously issued to plaintiff for construction of a soil remediation facility. The theory of plaintiff's case, and the facts, are recited in the Court of Appeals opinion reversing my order granting summary judgment for the defendants and remanding the case for a determination of Tri-County's damages. Tri County Indus., Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997).

At a status conference on March 14, 1997, the parties were directed to submit memoranda on the amount of damages plaintiff can establish, the legal justification for an award of damages, the effect of the District's defense of mitigation, and the amenability of the record to resolving the case without further evidentiary proceedings. The memoranda submitted by the parties betrayed diametrically opposite positions on the law.

1. Plaintiff takes the position that it is too late for defendant to contest the claim of $9.8 million in damages made in its original motion for partial summary judgment, because defendants failed to dispute the amount of damages or to submit any proof of its own. That position is rejected. Defendants were contesting liability, not the quantum of damages, at the summary judgment stage.

2. Plaintiff further asserts that defendant did not timely assert the defense of failure to mitigate and has filed a motion to strike. The motion will be denied. Strict limitation on the timing of pleading affirmative defenses is limited to the defenses of lack of jurisdiction, lack of venue, and failure to state a claim upon which relief may be granted. F.R.Civ.P. 8(c); F.R.Civ.P. 12. Other affirmative defenses may be raised by responsive pleading, such as an answer to an amended complaint, or by appropriate motion, including motion for summary judgment. See Charpentier v. Godsil, 937 F.2d 859, 863, n.4 (3rd Cir. 1991). In any event, liberal amendment of answers is allowed under F.R.Civ.P. 15(a). See Federal Election Commission v. Legi-Tech, Inc., 75 F.3d 704, 707 (D.C. Cir. 1996).

3. Plaintiff has also moved for summary judgment on the issue of failure to mitigate, arguing that the defense was waived (it was not, as discussed supra); that plaintiff has no obligation to initiate legal proceedings in order to mitigate, relying on Robinson v. Carney, 632 A.2d 106 (D.C. 1993); and that the District has failed to show that an appeal of the building permit suspension would have been decided in a reasonable time. That motion will be denied. The rule on failure to mitigate damages is that plaintiff may not recover damages for losses that could have been reasonably averted after the suspension of its building permit. Tatum v. Morton, 562 F.2d 1279, 1282-84 (D.C. Cir. 1977); Minkoff v. Clark

Transfer, Inc., 841 F. Supp. 424, 430 (D.D.C. 1993). Robinson , which held that a party's failure to protect his or her interest by filing a lawsuit does not constitute contributory negligence and therefore is not a complete bar to recovery, is completely inapposite. And plaintiff will not be heard to argue that defendants failed to show that an appeal from the suspension would have been resolved in a reasonable time. Tri-County took no appeal at all, not did it take any step to challenge the stop work order that was issued two days after the building permit was orally suspended. See Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1475 (5th Cir. 1991) (plaintiff's damages limited by the failure even to request exception to environmental regulation, even if exception would not have been granted).

4. The question of whether the stop work order issued two days after the suspension order moots plaintiff's due process claim (and bars recovery for all but nominal damages) was suggested by the Court of Appeals but has been given only passing attention in the parties' briefs. The issue is not presented for decision at this time, however.

5. The affidavit of plaintiff's environmental expert, attesting that it is "probable" that from 1994-2000 Tri County would have treated 75,000 tons of soil per year at $40/ton, is insufficient to establish loss of profits with reasonable certainty. See Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227, 1234 (D.C. Cir. 1997). As the record now stands, any estimate of lost profits related to Tri County's soil remediation business, a relatively new enterprise with no proven record of profits, would be based on speculation. Country Club Assocs. Ltd. Partnership v. FDIC, 918 F. Supp. 429 (D.D.C. 1996).[1]

An order will issue denying plaintiff's motion to strike and plaintiff's motion for summary judgment. No other motions are pending. The defense theories of failure to mitigate and mootness require a more developed record and perhaps an evidentiary hearing. A status conference will be set for the purpose of discussing how and when the necessary record development is to occur.

An appropriate order accompanies this memorandum.

/s/ James Robertson
JAMES ROBERTSON
United States District Judge

Dated: *7/24/97*

Contrary to plaintiff's assertion, defendant's challenge to plaintiff's proof of lost profits is not an affirmative defense.

TRIAL TRANSCRIPTS & EXHIBITS -- CIV. NO. 94-CV-2014 (D.D.C.)

Testimony of Karleen Donnells, Vice President of Tri County Industries.

[DE 111, p. 78 -- Direct Examination]:

Q. Ms. Donnells, does Tri County remove for treatment large quantities of soil that has petroleum in it?
A. Yes, we do.
Q. Have you been able to determine on an annual basis the amount of such soil that Tri County will handle?
A. On average, it's been well over 60,000 tons per year.

[DE 111, pp. 95-96 -- Direct Examination]:

Q. What is Plaintiff's Exhibit 34? * * *
A. These are the T.A. Bennett Trucking Company [invoices] for hauling of soil into the Bryant Street facility.
Q. Do you know why soil was being brought into Bryant Street?
A. We needed to perform a stack test with the new machine for the air quality permit.
Q. And what is Plaintiff's Exhibit 35? * * *
THE WITNESS: A summary of all the payments to T.A. Bennett with the cancelled checks. * * *
Q. What is Plaintiff's Exhibit 36? * * *

THE WITNESS: These are invoices from TSC Transport. They also hauled soil to Bryant Street. * * *

Q. And Plaintiff's Exhibit 37? * * *

THE WITNESS: Summary of the payments to TSC Transport and the cancelled checks.

[DE 111, pp. 100-01 -- Direct Examination]:

Q. You have fringe benefits, 28 percent at the top here. What are fringe benefits that you pay for your employees?

A. Those are be [sic] the unemployment, the federal and state unemployment taxes, Medicare, health and welfare benefits, holiday and vacation pay.

Q. And is that generally 28 percent of their paycheck?

A. That's correct.

Q. And what about corporate overhead? What does that generally include?

A. Corporate overhead is basically everything that is not a direct cost to a job.

Q. And is that at least 25 percent?

A. At least.

Q. And look at Plaintiff's Exhibit 44. * * *

THE WITNESS: It's a summary of all the expenditures we just verified. * * *

Q. For Bryant Street project?

A. Yes. * * *

Q. This does not include the lost profit claim; is that correct?

A. That is correct. These are all strictly direct costs.

[DE 111, pp. 102-04 -- Cross Examination]:

Q. Ms. Donnells, I direct your attention to Plaintiff's Exhibit 34. * * * And what is that exhibit?

A. This is the T.A. Bennett trucking invoice for hauling soil to Bryant Street.

Q. Okay. And it is for hauling soil for what period of time?

A. From -- well, from July of '93 to October of '93. * * *

Q. Okay. Let's start with the first invoice. What date was that for?

A. July 30, 1993. * * *

Q. That was contaminated soil on that day?

A. Yes.

Q. Okay. And the next invoice?

A. August 13, '93. * * *

Q. What is the next invoice? What is the date of that?

A. August 27, '93.

Q. Okay. What was done on that day?

A. Hauling soil. From Hilton Hotel and Fairfax schools.

Q. Okay. How much soil was hauled on that day?

A. Eighteen loads on this invoice.

Q. In layman's language, what does 18 loads mean?

A. You can average maybe, say, 20 tons per load. Depends on where it comes from.

Q. 20 tons per truck?

A. Uh-huh.

Q. Okay. And on September 13? You were billed for transporting soil from where to where?

A. From NIH * * * Bethesda. * * *
Q. Bethesda. And how much soil was transported on that day?
A. 13 loads.
Q. Okay. What is the date of your next invoice?
A. September 17. * * *
Q. How much?
A. Ten loads.
Q. Ten 20-ton truckloads? Okay. What does your next invoice say, ma'am?
A. September 24th. * * *
Q. And how much soil was transported on that day?
A. Ten loads.
Q. Ten loads? And do you have additional invoices?
A. I have one for October 8.
Q. Okay. And how much soil was transported on that day?
A. Eighteen loads.
Q. Okay. And do you have any other invoices for T.A. Bennett?
A. February and March of '94 invoices for hauling soil away from Bryant Street.

Testimony of John Wegznek, certified public accountant

[DE 113, pp. 113-14 -- Direct Examination]:

Q. Now, in this case, there was a soil cleaning -- piece of soil-cleaning equipment that Tri County intended to purchase which cost $600,000. * * * Did Tri County and its principals have sufficient cash resources to purchase this equipment? * * *

THE WITNESS: Yes, they did. * * *
Q. And what would have been the personal property taxes on this equipment if it had been purchased? * * *
A. * * * With a projected cost of $600,000 the first year's personal property taxes would be * * * $17,850, I believe.
Q. Now the lease that's been introduced into evidence for the -- for where the facility was to operate on Bryant Street indicated that Tri County had an option to purchase that property from the landlord for $1,400,000. Are you familiar with that provision in the lease?
A. Yes, I am.
Q. Did Tri County and its principals in 1993 have sufficient cash resources to purchase that property?
A. Yes, they did. * * *

Testimony of Glenn Selzer, President of Tri County Industries

[DE 113, pp. 117-19 -- Direct Examination]:

Q. Tell me what your company does.
A. The company does environmental services. The majority of our work right now is centered around the underground storage tank regulations the EPA passed. We do a lot of underground storage tank replacements * * *.
Q. When you dig up an underground storage tank that has leaked, what are you required to do with the soil?
A. The soils that -- around the tank in many cases, the tanks have corroded. Oil has leaked into

the soil. The petroleum product, the gasoline, or in most cases diesel fuel or heating oil has mixed with the soil, and the whole goal of the EPA regs is to protect the ground water. * * *

Q. And what do you have to do with this soil?

A. Well, we remove the soil that has been impacted by the oil until we get to clean soil that hasn't -- hasn't mixed with any oil. Then we take it to a treatment facility to be treated.

[DE 113, pp. 120-21, 123 -- Direct Examination]:

Q. When did -- before Tri County actually started this project on Bryant Street, did you have any experience in soil cleaning?

A. Yes. We would have had the problem since we got into this business. The problem we have, though, is all the facilities that handle it. Washington is a paper town; there is no real industry here. So cities that have industry obviously have more oil-impacted soil. They have services there. We ended up having to haul -- to this date, there is no place in the city to take the stuff. We have to haul it to other cities, Baltimore, Richmond, things like that.

Q. In 1991, did you start a soil cleaning business?

A. Yes. * * * On New York Avenue, 1911 New York Avenue. * * *

Q. How long were you working at New York Avenue?

A. We were there for probably several months. * * *

Q. Was the equipment that was used there tested by the District or in the presence of District of Columbia officials?

A. Yes, it was.

Q. And was a report issued regarding that?

A. Yes, it was. We hired a company at the city's requirement to come and do what is called a stack test. That measures volatile organics being emitted from the stack, if there are any, and also measures dust and particulate. * * *

Q. Did those tests pass the District of Columbia's requirements?

A. Yes, they did.

[DE 113, p. 125 -- Direct Examination]:

Q. * * * [W]hat happened with the facility on New York Avenue? Why did that not continue?

A. The site at 1911 New York Avenue was not zoned for the industrial use that we -- that -- this plant was considered to be an industrial machine. They come and said that the zoning there didn't fit the use of this machine. We had to find an industrial site.

Q. Did you start looking for an industrial site?

A. We did.

Q. And did you find one?

A. Yes. Sometime later we located a site at 2115 Bryant Street.

[DE 113, pp.127-33 -- Direct Examination]:

Q. What equipment were you going to buy for this project?

A. The -- the same we used on New York Avenue from Dustco, the Gencor thermal absorption unit. * * *

Q. What was the price of that?

A. $600,000. * * *
Q. How many employees would you need to operate this plant?
A. Five people.
Q. And what would their duties be?
A. A supervisor plant operator, an assistant that would help him run things, a loader operator that would run a loader, heavy piece of equipment to load the dirt into the machine, then a couple of laborers to go around and sweep up and keep things moving and just general labor work.
Q. How much would the salaries cost you for these employees?
A. About $50,000 a year for the supervisor; the assistant would probably be $30,000. Machine operator would make about $30,000 a year, the guy that runs the loader. The laborers, that's $7 an hour.
Q. How long would the plant be in operation?
A. We'd run six days a week, a shift and a half, run 12 hours a day. * * *
Q. In 1994, what was the cost on hauling?
A. It would run a dollar a ton. I base that on the dump truck rentals, about $40 an hour. They could go most places in the city in about half an hour.
Q. And then would you have to do lab tests as part of the operational costs of this?
A. Yes, we would.
Q. Why?
A. We'd do it in the initial -- like I mentioned before, just to assure what we was bringing over was just oil, oil that had leaked out of the

tanks in the soil. No hazardous wastes were there.

We would also do checks at the plant every day to make sure the soil that was in there was actually what the plant was -- we had identified originally, brought in there.

Q. Did your permit allow you to treat any hazardous wastes at this facility?
A. No, it didn't. * * *
Q. Did -- how much would lab tests have cost?
A. About $35 each. * * *
Q. How often, how many tests do you feel that you would have been doing per day?
A. Probably four.
Q. Does your company own a loader that it could have used to put the dirt with petroleum into this machine?
A. Yes, we do.
Q. And what about a mechanic to do repair work?
A. We also have mechanics.
Q. On staff full time?
A. Yes.
Q. Tell me what you do with the dirt when it comes out of the machine with the petroleum removed.
A. Once the clean dirt comes out of the machine, we're * * * constantly digging up other sites in the city where there's tanks. We take the clean dirt and use it to fill in those holes. Currently we have to buy dirt, backfill material to backfill those holes with.
Q. * * * [I]n 1994 how much were you paying for clean fill dirt?
A. I'd say a minimum of $2 a ton.

Q. Have you estimated how much clean dirt you would be able to resell coming out of this cleaner?
A. 40-, 45,000 tons.
Q. Have you -- you're aware of the production rate of this piece of equipment; is that correct?
A. Yes.
Q. How many tons of soil could you have cleaned in a year with this machine?
A. About 75,000 tons.
Q. And did Tri County have the ability to keep this machine going full time with its own business?
A. Yes.
Q. * * * [I]s there a certain amount of material that the machine does not clean?
A. Yes. When you dig these sites up, you always have the pavement that is over the top, concre , some under sidewalks, curbs. You get about 10 percent of the material that comes in is not soil * * *.
Q. That would still be charged to the customer?
A. The trucks are weighed by the ton. They pay for all the tonnage on the truck.
Q. What were your financial projections when you started this project in terms of profit?
A. Probably $2 million a year.
Q. And your permit was suspended by Mr. Cross, the director of DCRA, in September, the 20th, of 1993. Do you recall that date?
A. Yes, I do. Very well.
Q. How much longer before your plant would have been operational?
A. 30 to 60 days.
Q. What remained to be done?

A. The gas line was pretty well down the street. It was just about completed. We were moving the equipment from the Midwest. * * *
Q. What type of tests did you have to undergo for the District before you could start receiving soil?
A. As part of the permit to construct the plant, the environmental control division of DCRA, the air quality section, Mr. Wamsgans' office asked us to perform an additional stack test like we performed on New York Avenue.
Q. What do you mean by a stack test?
A. That is a test where we run the plant and run soil through the plant, they hook up air-monitoring equipment all up and down the stack that comes off the afterburner and measure for any contaminants or hydrocarbons, those carbons that wouldn't get remediated in the plant, and also measures for dust, the amount of particulate you put into the air.
Q. This was the same test, though, that had been performed a year or two before on New York Avenue on the equipment?
A. He just wanted to make sure the machine was operating as efficiently as there. * * *

[DE 113, pp. 135-39 -- Direct Examination]:

Q. Before this suspension on September 20, when he [, Hampton Cross,] suspended your plant from operation, had you received a ticket from D.C.?
A. We did. * * *
Q. And what was that ticket for?
A. Operating without an occupancy permit * * *.

Q. Did you have a certificate of occupancy at that point?
A. No, we didn't.
Q. Why not?
A. In order to get the certificate of occupancy, we had to complete the requirements under the permit to construct.
Q. When you were bringing the soil in, were you operating at that point?
A. No. That was * * * we brought the soil in to burn for the stack test, which was part of the permit to construct. We had to construct and test it before they would give us an occupancy permit.
Q. Did you pay the ticket?
A. No, we didn't.
Q. How much was the ticket?
A. $500. * * *
Q. On September 22, after Mr. Cross had suspended your permit to do work on this project, was the stop work order posted on your building?
A. Yes, it was. * * *
Q. At that point, why didn't you pay the ticket and have the stop work order removed?
A. Well, the -- if that was the only problem, it would have been very simple. Just pay the $500, whether we were wrong or right, and go back to work. That wasn't the real problem.

The real problem was Mr. Cross suspended our construction permit, and we had no way of knowing whether we were ever going to be -- you know, be able to continue with the project, or if it was going to remain suspended.

Q. Did you have the ability at any time to take that dirt out of the facility or get a provisional certificate of occupancy?
A. Yes, we did.
Q. Why didn't you do those?
A. We thought the -- like I say, we were solving the problem with Mr. Cross, that was the big problem. We -- in other words, if we couldn't solve that problem, the other stuff didn't make any difference. We could have paid the thing and still hadn't done anything with the permit suspended. * * *
Q. Why didn't you appeal this decision?
A. Well, in consulting with Mr. Farmer [, Tri County's counsel], he said the appeal * * * would take at least a year and that * * * the appeal board was politically motivated, you know, if there was public pressure, * * * that it * * * wouldn't matter whether it was legal or whether our facility was what we said it was or anything else.

So basically we lose a year, and the -- at that point, the project would fall apart. I mean, the machine we had for * * * $600,000 would probably be sold to someone else by then. We'd have to find a new one.
Q. Did you know where you could find a new one?
A. No. We -- we knew manufacturers that made them, but we hadn't -- we didn't investigate that at that point because of -- you know, the Dustco machine was a used machine, so it was probably less than half, or around half the cost of a new one.

Q. If you had appealed, would you have had to purchase the equipment?
A. Yes, we would have.
Q. Why?
A. Like I said, Mr. Johnson at Dustco had other people interested in it. * * *

Anyway, he had other sales for the machine. He wouldn't have sat around and waited a year for us. He would have sold it to somebody else.

Q. What about the rent during the period of time? Would you have had to continue paying rent during an appeal time?
A. Yes. And the rent was substantial. Like I say, it was $14,000 a month basically for this warehouse and this property. * * *
A. It would have cost us a -- close to a million dollars to appeal it in -- at the end of the appeal, * * * if there was political motivation, we would have lost that appeal and had to go to the next step. Who knows how much more it would have cost us?
Q. What decision did you make then?
A. At that point, we decided that we couldn't go forward with that appeal. To -- in November, we gave the property back to the owner.

[DE 113, pp. 145-46 -- Cross Examination]

Q. * * * And what is Plaintiff's Exhibit 34, sir?
A. This is bills from a trucking company, T.A. Bennett Trucking Company, that did hauling for us.
Q. Does that represent billings for soil trucked to 2115 Bryant Street?

A. Yes, it does.
Q. What are the dates of those billings, sir?
A. The first one is on July 30.
Q. What period, sir?
A. 1993. I'm sorry. August 13, 1993, August 27 of 1993, 9/10/93, 9/17/93, 9/24/93, and 10/8/93.
Q. Okay. During that period, sir, did you have a permit to operate the facility?
A. At Bryant Street?
Q. Yes, sir.
A. No, we didn't.
Q. And weren't you cited as a result thereof for storage of soil without a permit, certificate of occupancy?
A. We were cited for operating without an occupancy permit.

[DE 113, pp. 166-68 -- Cross Examination]

Q. And did you receive that letter, sir?
A. Yes, I did.
Q. Okay. And who wrote that letter?
A. Ferial Bishop.
Q. When is it dated?
A. 15 October 1993. * * *
Q. And are there a series of questions that she asks?
A. Yes, there is.
Q. Okay. And at number 2, does it indicate that she wanted to know the amount of soil you processed per day at the facility?
A. Yes, it does.

Q. And number 3, did she want to know the number of trucks in and out of the facility each day?
A. Yes.
Q. Number 4, did she want to know the proposed routes of the trucks * * * through the neighborhood?
A. Uh-huh. * * *
Q. Contingency plans for any odors, if any?
A. Yes. * * *
Q. Mr. Selzer, did you respond to the letter?
A. With a phone call. * * *
Q. Mr. Selzer, you're not answering my question, sir. I asked if you responded to this letter from Ferial Bishop.
A. Prior to her sending it. * * *
Q. Okay. My question is, did you answer the letter?
A. This letter?
Q. Yes.
A. No. * * *
Q. And you ignored the letter?
A. No. I sent it before they sent the letter -- during the permit application. They had all this information. We went through vector control for the rodents, through site plans, an engineer's site plans, surveys of the property, sizes, all this -- exact questions were part of the permit application. They had all this information months before they sent the letter.

[DE 113, pp. 181-82 -- Redirect Examination]:

Q. Did the District of Columbia have a review process that you had to undergo to get this permit?
A. Quite extensive. We spent almost a year, a good nine months, meeting with different DCRA agencies and the city officials, even Council Member Thomas' office, and made a presentation as to what was -- what the project would do and how it worked and all the technical review and measurements and property lines, site drawings. Just an extensive, tremendous amount of work.
Q. Before the District issued you this building permit, had you supplied them with all of the information regarding your project that they requested?
A. Yes, we did.
Q. When you received the October 15, 1993 letter requesting more information, was any of those requests seeking information that you had not given to the District already?
A. No. * * *
Q. Did the District of Columbia have any right to request additional information from you after your permit had been issued?
A. Our counsel advised us, no, that we had already complied with all the letters of the law in obtaining the permit.

[DE 113, pp. 183-84 -- Court Examination]:

THE COURT: For stack testing, you needed 75 tons of dirt?

THE WITNESS: Yeah. Actually, what happens when you first set the plant up to perform the stack test, it's when you first start processing soil and they burn it, the bag house, the stuff that takes the particulate out, not the part that takes the oil out, but the part that controls the dust from the dry dirt is almost similar to a swimming pool filter where it coats the filter before it starts operation.

You have to coat the bag house with dust to burn soil for probably about an eight-hour period to get everything coated and set up.

THE COURT: You have to run it for eight hours before you can do it for three hours?

THE WITNESS: Before your can start running soil for a test, yes.

THE COURT: So at 11 hours -- so that's three hours of testing and eight hours of prep. That's 11 hours.

THE WITNESS: Probably so.

THE COURT: At 25 tons an hour?

THE WITNESS: Yes.

THE COURT: That's 275 tons?

THE WITNESS: Sounds pretty accurate.

THE COURT: About 15 dump trucks full? 14? 20 tons a truck?

THE WITNESS: Yes. Probably about 15 truckloads,' something like that.

Testimony of Jonathan L. Farmer, counsel for Tri County Industries

[DE 113, pp. 191-93 -- Direct Examination]:

Q. When Tri County's building permit was suspended on September 20, 1993, do you recall that incident?

A. Yes, I do. * * *

Q. Would you tell the ladies and gentlemen of the jury what you did?

A. I called Mr. Cross to ask him the circumstances by which the permit had been suspended and exact reasons why. Mr. Cross indicated to me that he had attended an Advisory Neighborhood Commission meeting, that it had been a very raucous and somewhat unpleasant meeting. I think what he exactly said to me was the nastiest meeting he ever had attended.

There were questions about the permit and its effect on the immediate neighborhood, certain politicians were asking questions as well about the permit, and that he was going to suspend it for further investigation.

Q. Did you request that he lift the suspension?

A. Within that same conversation?

Q. Or anytime after that conversation?

A. Yes.

Q. And what was Mr. Cross' position?

A. Mr. Cross' position was that it could not be lifted. One, he had been directed that it was not to be lifted. Two, they had discovered that there were residences within a certain distance of the building.

Q. Who -- did Mr. Cross indicate who told him that it could not be lifted?
A. I believe the city administrator at that time.
Q. Did you tell that to the client, Tri County Industries?
A. Yes.
Q. Did -- what did you advise Tri County Industries at that point they should do?
A. Basically, as I said, they had -- I think they said they had a right to an appeal, but I indicated to them that that appeal would take some time.
Q. Do you recall where that appeal would have been directed to?
A. Board of Appeals and Review.
Q. And is that the only appeal remedy that they would have had in this situation?
A. Depending on the nature of the suspension, no; it could have also gone to the Board of Zoning Adjustment.
Q. How long did you tell them it would take to appeal to the Board of Appeals and Review?
A. Eight months to a year.
Q. Did you make any recommendations to them?
A. I believe I said that was really a business decision or their choice at that particular juncture, asking for direction.
Q. * * * [C]ould Tri County have filed a lawsuit to set aside this suspension in a court rather than an administrative appeal?
A. I don't think you could have gotten to court without exhausting the administrative remedy.
Q. What do you mean by exhausting administrative remedies? Explain that to the jury.

A. You have to appeal to the agency directly. You have to give the agency an opportunity to address this situation before going to court.
Q. What happens if you file a lawsuit without following through on your administrative appeals before?
A. I assume it is dismissed.

Testimony of Alfred Dishian, business consultant

[DE 113, pp. 198-204 -- Direct Examination]:

Q. What experience do you have with soil-cleaning equipment, Mr. Dishian?
A. Well, I worked for Gencor Engineers. * * *
Q. What was their product line?
A. Their product line was low-temperature soil remediation equipment and plants.
Q. And what was your position with that company?
A. Business development manager. * * *
Q. Did Gencor sell a model 232?
A. Yes, they did.
Q. And what was the name or the number of that model changed at any time? * * *
A. * * * I introduced a new numbering system, a 625/825, which meant temperature of operation, size of plant was a different nomenclature, but essentially the 625 plant was the same as the 232 plant. * * *
Q. Why don't you explain to the jury how this type of equipment operates. * * *
A. * * * So the soil comes in, very much -- and is tumbled around like in your drier at home. * * * The flame and hot gases pass through the

soil, heat it up, and drive off the petroleum oil that's in the soil and the moisture that's with it.

The hot gases are pulled from this rotary drum into a bag house, very much like a vacuum cleaner. * * *

Now the dust falls to the bottom here, and there's a screw which carries it out to another mixer here, and water is put in it. The soil -- the hot soil comes from here and goes up to the bag house.

Now the reason for this is that the hot soil that comes out of here is clean, but the dust that comes out of this end that goes to the bag house may not be as clean. So what they do is they take * * * the hot soil, and this is around 600 or 700 degrees, very hot, and they put it in the bottom of the bag house, and there's a screw which pulls it all through the bag house.

Now * * * there's a compressor that pushes on the bags, and it drops the dust down on the hot soil, going through here. And that mixing dries off what little petroleum is left in the dust and is sent out to a furnace. Just like a regular furnace might burn all these gases.

The hot soil then is mixed with -- with the dust and water is put in it, and then it becomes a clean pile of dirt.

Now, the gases here go to that furnace over here, where there's another burner. The gas is put in and is raised to approximately 1600 degrees Fahrenheit, which guarantees for the length of time that this is sized for that the gases coming out of here will be 99 percent free of petroleum. That's the way the machine is designed. * * *

Q. I'd like to show you what's been marked as Exhibit 47. * * *

Q. What is the second page?

A. Process specifications and performance.

Q. Are those the specifications that were in effect in 1993 for the Gencor 232 or 625 units?

A. Yes. Yes.

Q. And are those specifications accurate in terms of the capability of the equipment?

A. Yes. * * *

Q. What is the amount of soil that this piece of equipment can treat?

A. Well, it has a nominal capacity of 25 tons an hour. It varies depending upon the amount of moisture that's in the soil. * * *

Q. How high can the capacity -- or the treatment rate go?

A. Well, at 6 and 8 percent moisture, you can get almost 40 tons an hour out of the machine. * * *

Q. * * * [C]an you tell us how many employees it normally takes to operate this equipment?

A. * * * I would say there's three people at a minimum.

Q. If you had a qualified mechanic, what would be the repair parts and costs for that on an annual basis for this type of machine?

A. Well, the parts, I would say if you -- usually you run through the bags. Like I said, there are 232 bags in the bag house. And you usually run through one of those sets of bags in a year's time. They cost $12,000 to $14,000. Other incidentals that -- belts for the pulleys and bearings and so forth, electrical components, I would raise that up to $18,000 to

$20,000 a year in parts alone * * * for a single shift operation. If you operate the machine two shifts, then, you know, you're going to get more wear.

[DE 113, p. 214 -- Cross-Examination]:

Q. Would you agree that there is some -- there are some health risks associated with the handling and processing of contaminated soil involving gasoline products? * * *
A. No more than filling up your car with gasoline.

Testimony of Donald G. Carter, consulting engineer

[DE 113, pp. 223-27, 230 -- Direct Examination]:

MR. EMIG: Your honor, at this point, I would move the Court to recognize Mr. Cross [sic] as an expert in the field of mechanical engineering, energy, and the cost of energy estimating.

MR. BOLDEN: I have no objection.

THE COURT: All right.

BY MR. EMIG:

Q. * * * [D]o you have an opinion as to the annual utility costs that Tri County would have incurred if it had operated a soil-cleaning facility at 2115 Bryant Street?
A. I do.
Q. And what is that opinion?
A. It was expressed on my spreadsheet, without memory of the numbers, it is my opinion of the electrical, the water, and the gas costs that

would apply to the equipment that was going to be applied at that project.
Q. Will you look at Plaintiff's Exhibit 52. * * *
Q. Is that, in fact, your sheet?
A. Yes, sir. This is the sheet.
Q. Okay. Now when you prepared that, what did you rely upon?
A. Manufacturers' data for the equipment in question. * * *
Q. Okay. What else did you rely upon?
A. * * * So I relied on the information given me by the man with Washington Gas who does that or did that, and he provided me with the exact information I needed. * * *
Q. Look at Exhibit 51, please. * * *
Q. What is that?
A. These are the gas rates for commercial, primary, and high voltage service, or for secondary service. In this case, that sheet is the secondary service as one would pay.
Q. You said gas rates.
A. I mean electricity. * * *
A. * * * The system could do 20 tons of soil per hour. * * *

305 days in a particular year would have no holidays and no Sundays, but it would be those same six working days without holidays or Sundays that were at stake. There would be 12 hours of work per day. We would add to that a half an hour of warmup time at 10 percent of the fuel consumed to bring the equipment up to temperature before it began working.

Testimony of Vincent DiRenzo, environmental consultant

[DE 113, pp. 238-39, 240-44 -- Direct Examination]:

Q. Which treatment facilities in this area do you normally deal with?
A. Presently there's really only two that are remaining. TPS out of Baltimore, and also Bardon, which operates a facility in West Virginia.
Q. Do they have any in Virginia?
A. No. I don't think there's any thermal treatment units in Virginia anymore. * * *

MR. EMIG: I offer Mr. DiRenzo as an expert in the field of remediation of soil with petroleum content.

THE COURT: Any objection to that?

MR. BOLDEN: No objection

THE COURT: All right. * * *

Q. Did you at my request do an analysis of the costs in the Washington metropolitan area to thermally treat soil with petroleum in it during the period 1994 to the year 2000?
A. Yes, I did.
Q. Did you prepare a report that reflects what those costs were?
A. Yes, I did.
Q. Look at Exhibit 54, please. * * *

BY MR EMIG:

Q. When did you prepare that report?
A. The document is dated March 24, 1995. That seems the timeframe is correct. * * *
Q. Did you have an opinion as to whether in 1994 there was a need in the Washington area for a thermal treatment facility to clean petroleum soil? * * *

A. That there was a definite need.
Q. Why do you say that?
A. We had numerous projects going on at that time. In addition to the market itself, any -- or most of the construction projects within the D.C. metro area generally require excavation of the materials within the area that they are building, 'cause they're putting parking garages or that's part of the design.

Because of that, in the Metro additions, a lot of the construction projects were generating a large volume of contaminated materials at that time. * * *

Q. And did you since that report, since there was some time between when that was prepared and when we came to trial, did you have occasion to update your report?
A. Yes, I did.
Q. And tell us what you did for that.
A. Basically what we did was we went back and resurveyed because there had been -- since we had done the initial survey, there had elapsed quite a bit of time, and there had been a lot of change in the marketplace. So what we did was reevaluated, spoke to the disposal facilities that exist now, which are much less, and then just basically redid and justified the pricing again.
Q. And do you have a copy of that report?
A. Yes, I do.
Q. Is that attached at the end of Plaintiff's Exhibit 54?
A. Yes. That's my letter dated March 30, 1998.

Q. And tell the jury what your opinion is in terms of what the market rate would have been for thermal treatment of soil with petroleum in it during the period 1994 to the year 2000.

A. Sure. Basically, for all of 1994, again, we were looking at $40 a ton; in 1995, we were seeing a decrease, basically about $2 a ton to $38 a ton. Then in 1996, basically we differentiated part -- two halves of the year because there was quite some change. It dropped again by $2 to $36 a ton. By the end of 1996, it was down to about $34 a ton, averaging for the year about $35 a ton for the year 1996.

Then our projection from 1997 through 2000, some of which we had information on '97 and also in discussing with -- updating the thermal treatment facilities in that market -- that are within the D.C. market, we came up with $32 a ton.

Q. Do you know if these rates included transportation to the facilities?

A. They did.

Q. Do you have an opinion, Mr. DiRenzo, that if Tri County Industries had opened a soil treatment or soil-cleaning facility in 1994 if there would have been sufficient petroleum soil so that it could have treated 75,000 tons per year from 1994 to the year 2000?

A. I feel very confident it could have.

Q. Why do you say that?

A. Just because of the amount of projects. Again, to the construction, the whole Metro line that went through, as well as all of the additional construction projects -- and most of these are just federal based -- involving large amounts of

contaminated soil being so close within the District of Columbia made it just very advantageous. It would have for us, and we did dispose of contaminated soil at that time.

MR. EMIG: Your Honor, I move for the admission of Plaintiff's 54.

MR. BOLDEN: Your Honor, I would object to the report.

THE COURT: I don't think we need Exhibit 54 because * * * you have his opinion on the * * * dollar cost per ton per year. You have his opinion that there is enough soil to satisfy 75,000 tons per year. I think those are the basic opinions you need. The report is unnecessary, and I'll sustain the objection.

[DE 113, p. 253 -- The Court]:

THE COURT: You said there is no remediation facility or soil-burning facility in Virginia?

THE WITNESS: Well, there wasn't. A lot of it was landfilling or other types, bio-remediation, but the actual thermal treatment process, there was not.

THE COURT: Never was?

THE WITNESS: There was one with Enviro-Care for a short period of time.

THE COURT: What happened to it?

THE WITNESS: They eventually lost their permit, and I think it was never -- once it expired, I don't think it was allowed to be reactivated.

THE COURT: What was the facility referred to in your report that attempted to gain

a larger portion of the market by reducing gate prices below cost and had to be sold at a loss as it could no longer make payment on an incurred debt?

THE WITNESS: That was a facility in Baltimore. Again, they came into the market when there was a lot of construction activities and tried to really lower the price of their -- I guess to try to get into the market. Basically within a year, they were out of business.

Deposition Testimony of Larry Johnson

[DE 113, pp. 7-16]

Q. And how long have you owned these Gencor 232s?
A. Since 1990.
Q. Are you familiar with the operation of these pieces of equipment?
A. Yeah. * * *
Q. Do you supervise the operation of these pieces of equipment?
A. Yes.
Q. Are [sic] they produce any excessive noise or odor or smoke when they are operated?
A. No. * * *
Q. And what about dust or smoke?
A. There is no dust and there is no smoke. The only thing we have is steam comes off the hot soil on the discharge end. * * *
Q. And is there any odor produced by this process?
A. No. * * *

Q. Okay. Are you familiar with the soil treating capacity of this particular Gencor 232 unit?
A. Yes.
Q. How many tons of contaminated soil will it treat per hour?
A. 25-40.
Q. How many people does it take to operate this particular model?
A. A minimum of three per shift. * * *
Q. What percent, based on your experience, of soil that it brought into your facility does not have to be treated because of its larger size?
A. 10 to 25 percent.

Testimony of Joel M. Morse, professor of financial economics

[DE 113, pp. 259-66 -- Direct Examination]:

Q. Do you teach valuation of new businesses to your students?
A. Yes. Essentially, a new business is part of the curriculum in corporate finance as well as in investment analysis.

A new business is really a prospective or forthcoming set of cash flows. As such, I routinely teach that to people who are out there doing that stuff, and I have done it as a consultant; and I both teach and learn from my students who are practitioners of this art. * * *
Q. Have you testified or prepared opinions on the issue of lost profits of new businesses before?
A. Yes, I have.
Q. And can you indicate when that would have taken place?

A. Well, I've done that from time to time on and off in court since 1988. I would say it happens at least once a year, probably more often. * * *

Q. Is there anything that makes valuation of new businesses too speculative for you to reach a valuation figure?

A. To value a new business is an established part of discipline I teach in the graduate program at the University of Baltimore. We wouldn't teach it if it were speculative. We believe it's a natural part of business decision-making which is to go into new ideas, new ventures and new areas.

MR. EMIG: Your Honor, I offer Dr. Morse as an expert in the field of financial economics.

MR. BOLDEN: No objection. * * *

THE COURT: No objection? All right. Dr. Morse may give opinion testimony in this field.

BY MR. EMIG:

Q. Did you at my request do an analysis and prepare a report regarding the lost profits that Tri County Industries sustained when its building permit was suspended by the District of Columbia?

A. Yes.

Q. And for what period of time did your report include?

A. The year began in 1994 and continued through the year 2000, so some of those lost profits are past and some are future. * * *

A. Yes. [Exhibit] 56 is my report in this matter dated April 1995.

Q. And did you arrive at an opinion in terms of how much Tri County Industries lost in terms of profits during the period 1994 through the year 2000? * * *

A. That amount was $11,628,174. * * *

Q. The information that you received regarding the costs and the profit -- or the costs and the revenues for this project, was that the type of information an expert in your field reasonably relies on?

A. Yes. * * *

Q. Let me ask you one question. The revenue figure on which you base your figures, were they provided by Mr. DiRenzo of Apex Environmental?

A. Yes.

[DE 113, pp. 272-73 -- Direct Examination]:

A. * * * So I'm working here in a model of revenues minus costs, which I feel is a traditional model and a traditional way of looking at the prospective or possible profitability of a new venture. So, for example, in the year 1994, I estimated that revenues would have been $3,367,500. From that, I took away the cost of doing business. * * *

I subtracted the cost line from the revenue line. So, for example, this number here, $2,031,592, is really easy to get at. All I did was take $3,367,500 and take away from it or subtract $1,335,908; and I got as a result, or as an answer, $2,031,592.

[DE 113, pp. 276-77, 279-81 -- Cross-Examination]:

Q. As I understand your testimony, Dr. Morse * * * you don't have expertise in the soil remediation field; and in putting together your numbers, you relied upon reports and numbers put together by other persons in the field; is that correct?

A. Yes.

Q. And your opinions then piggyback on the opinions of other experts retained by Tri County in this litigation?

A. Yes. * * *

Q. * * * Did you independently look at the profitability of the companies that had been surveyed in Apex's report?

A. No. * * *

Q. Then is it true that you made no assessment as to whether the companies that are indicated in this report prepared by Apex were start-up companies?

A. That's correct. * * *

Q. * * * Wouldn't it seem reasonable that you would compare your profitability statement based upon a company similarly situated to Tri County, one that was new to the field, one that had no prior experience or training in the field, and one that, for all intents and purposes, was nonexistent?

A. Well, that last sentence throws me for a loop. If it's -- I cannot compare anything with a company that you said was nonexistent.

Q. Hold on a minute. You can compare it, then, to a new company in the field?

A. What I have done is common to my field, which is to estimate the costs and the revenues for a new venture using data that's knowledge -- data and knowledge in that industry. And I relied on -- and I was asked to rely on -- the report we are now discussing from Apex.

I was not asked to do the ideas that you are now suggesting, and I did not independently believe that to do so would be either possible or appropriate.

[DE 113, pp. 284-85 -- Redirect Examination]:

Q. Dr. Morse, do you have any indication that any of the information you relied upon in the preparation of your estimate of damages was either wrong or incorrect?

A. No. * * *

THE COURT: Dr. Morse, your projection for the first year of operation of this business shows roughly $2 million of profit -- is it fair to call it profit?

THE WITNESS: Yes.

THE COURT: -- on $3 million of sales. Do you have a measure of how profitable that enterprise is?

THE WITNESS: That's a very profitable enterprise, if that's what Your Honor is getting at. * * * This * * * would have been * * * a very profitable business. Are you asking if that's an unusually high profit margin?

THE COURT: * * * How would you describe, how would you quantify that profitability?

THE WITNESS: That would be a profit margin well in excess of 50 percent.

THE COURT: And what would you say the return on investment would be?

THE WITNESS: Well, I have not -- that's a good question, sir. I have not been provided with the capital costs in their entirety. I've been provided with estimates that I believe were dignified [sic] of the revenue and the costs.

To the extent that I looked at capital, I annualized it or I annuitized it. That would be the land value and the equipment value. * * *

So looking at the profit as a percentage of capital, you still would see * * * an extremely profitable business which has been discussed today.

Deposition Testimony of Harry Thomas:

[DE 113, pp. 286-88]:

"Question: Mr. Thomas, you are a member of the D.C. Council representing Ward 5; is that correct?

"Answer: Yes, I am. * * *

"Question: You are also chairman of certain committees; is that correct?

"Answer: Chairman of the Public Works and Environment. * * *

"Question: Did you or your office have any contact with DCRA after this meeting, and I'm talking after September 20, 1993, regarding this project?

"Answer: Officially, I don't think we had any. * * *

"Question: What about unofficially?

"Answer: I might have seen Hampton someplace and said to him that because of opposition we had some problems there. * * *

"Question: But you did indicate to him that you were opposed to this project going forward?

"Answer: I made that loud and clear."

Deposition Testimony of Hampton Cross:

[D.E. 113, p. 290]:

"Question: You indicated earlier, Mr. Cross, that you had a conversation with the mayor's office following the September 20 meeting. Who was that with?

"Answer: That was with Mayor Kelly. It was with Mayor Kelly. It was a meeting.

"Question: Who else attended that meeting?

"Answer: Two or three, I don't recall how many, I don't even know if you call them representatives. Two or three members of the community, who lived in the community around the Tri County facility, and also Claude Bailey, who was the Deputy Corporation Counsel attended the meeting.

Deposition Testimony of Francine Howard James, Executive Officer, D. C. Board of Appeals and Review:

[D.E. 113, pp. 294-95]:

> "Question: What is the purpose and function of the board?
>
> "Answer: The purpose of the board is to hear appeals from aggrieved citizens who are dissatisfied with final decisions and orders that they receive from the Department of Consumer and Regulatory Affairs * * * .

[DE 113, pp. 309-23 -- Argument of Counsel]:

> MR. EMIG: * * * [W]hat concerns me is evidence -- of him coming in with evidence that their neighbor -- there are houses in the vicinity. That's very prejudicial when he can't tie that in to any basis for having the permit suspended, Your Honor. I think he's just playing on the prejudices and concerns that really got this project sidetracked in the beginning. I mean, I think he needs to establish there were some grounds.
>
> THE COURT: Well, where are we going here, Mr. Bolden? What are you going to prove? Or try to prove?
>
> MR. BOLDEN: Well, our case in part is that the project would have been suspended anyway or that the project would not have gone forward for various reasons. * * *
>
> THE COURT: Like what reasons?
>
> MR. BOLDEN: Well, one very obvious reason is that there were health and safety

> concerns that Hampton Cross had, as well as the community had, which impacted on the health and safety of that community. * * *
>
> We -- again, in terms of Carey versus Piphus, that's our case, that the project would not have gone forward for various reasons. * * *
>
> THE COURT: * * * You mean there is going to be another whole layer of approvals?
>
> MR. BOLDEN: We're not saying a whole layer of approvals, but certainly any project which presents a health risk or a danger doesn't have carte blanche to operate. There has to be a process by which * * * adjustments are made. * * *
>
> THE COURT: Given the Court of Appeals' ruling -- and I think Mr. Emig is correct to this extent, that the Court of Appeals has ruled that the suspension order was unlawful -- by what procedural means or mechanisms could or would the District have acted to take that second look once you -- understanding that it already had issued am [sic] air quality permit and a building permit?
>
> What additional permits were necessary?
>
> MR. BOLDEN: Well, first of all, Tri County had no permit to do business there.
>
> THE COURT: Right.
>
> MR. BOLDEN: Hadn't applied for it. Hadn't been granted. So it still had to go through the -- the panoply of inspections by various entities of DCRA.
>
> THE COURT: Can you be a little more specific about this? I mean, this -- what did it

need? What permit, what precisely -- precisely what permit did it need?

It had a building permit. It had an air quality control green light. What permits did it need?

MR. BOLDEN: It did not have a certificate of occupancy.

THE COURT: All right.

MR. BOLDEN: Which permitted it to do business.

THE COURT: Is there any discretion on the -- in the board -- or whoever the issuing agency is -- to issue a certificate of occupancy if the building conforms to the building permit?

MR. BOLDEN: Well, there are inspections by various entities, including the fire department, zoning, electrical department, so there's still a range of inspections that had to * * * undergo.

In addition, the equipment that Tri County proposed to use had to * * * undergo a -- an additional round of emissions tests, under the air quality permit. They couldn't -- they couldn't do anything with that permit until they brought the equipment here and tested it.

THE COURT: Okay.

MR. BOLDEN: The equipment had not been physically at 2115 Bryant Street. It had -- the initial approvals are based on a 1991 stack test on New York Avenue.

THE COURT: Okay. Fine. But electrical tests, fire code tests, stack tests -- assume with me -- and I think it's fair to assume that Tri County would pass all those tests * * *. I mean, if they didn't, that's another round. But

you're talking about new concerns about health and safety issues.

Now, unless the District of Columbia were to change the standards for stack gases and particulates, which they had not done, then I think we have to assume that the machinery would pass the same air quality test on Bryant Street that it had passed on New York Avenue.

Now, what different -- what areas of health and safety does Siess say would now be raised, and how except for a certificate of occupancy would they be raised? What other permit did they need?

MR. BOLDEN: Your Honor, there's a whole area of handling of this material, and it had to be handled in such a way that it protected the community. There had to be plan[s] for transporting it through the community. There had to be plans for -- there had to be some way of overseeing how this material was -- passed through the community.

It turned out later on that there had been misrepresentations in the initial application concerning where the residential houses were. I mean, all of that had to be dealt with, which is why there was the issuance of this October 15 letter concerning information that was needed.

THE COURT: Do you disagree with this gentleman's testimony that everything asked for in that October 15 letter had already been provided to the District? * * *

MR. BOLDEN: Yes. I disagree. I don't agree.

THE COURT: * * * I share some of Mr. Emig's concern about your wa[]ving a lot of health and safety concerns in the community as if health and safety concerns would ultimately doom this project.

You haven't given me an answer that I find acceptable yet to the question of what legal mechanism would have stopped this project.

The health and safety concern question, obviously we'll have experts on both sides of this. We have experts on both sides of any question. But we already have one man who says this is like working in a gas station.

You don't believe that. * * *

I will say, however, Mr. Bolden, that it is conceivable that after hearing the testimony of a witness expressing generalized health and safety concerns, it is conceivable that I will hear the testimony and strike it.

I thought that your Carey and Piphus showing would be a much more targeted showing to the effect that it is established District of Columbia -- for example, it is established District of Columbia law that a building permit and an air quality control permit don't cut it; that a certificate of occupancy doesn't cut it; that there's another permit required under established D.C. regulations, and that permit is called an operating permit. And that under District of Columbia law, before Tri County could obtain an operating permit, it had to make a new showing on the basis of plans, et cetera, et cetera, that there would not be any deleterious effect on the health and safety of the population. And these are the established

standards and it is clear from the record that Tri County could not have met these established standards.

Now if you can make that kind of showing, make it * * *.

[DE 112, pp. 337-41 -- Ruling of Court on defendants' motion for judgment as a matter of law]:

THE COURT: * * * Now, the future earnings case, I think, is a much more difficult one. It seems to me that what is missing from this record -- but I'm going to consider it further -- seems to me what is missing from this record is evidence that -- is evidence of the market for processing all this soil.

Now, I know there's an expert who said, "Oh, yeah, there's enough soil around here to bring 75,000 tons a year." Sure, there's plenty of soil around; but you need more than soil, you need some established position in the marketplace.

This -- there's nothing in the calculations of any of these experts that there's any buildup. This company is going 75,000 tons a year from day one of these calculations, all the way through, full capacity. No evidence about how he gets there, how he markets it, how he's going to make this thing run. And the expert -- the financial economist conceded that the profitability figure for this company is extraordinary.

It looks very speculative to me. Now, I'm going to consider this further between now and the time this case goes to the jury. I'm not

sure I'm going to sent the future earnings question to the jury. If I do, however, it will be with the same ruling that I'm making now, which is to -- which is the conditional ruling that Rule 50 requires.

I'm denying the defense motion for judgment as a matter of law, conditional on its being renewed at the close of all the evidence; and, if I send these issues to the jury, conditional on it being renewed again after the verdict.

I think there is a hinge here somewhere between the past -- between the money that Tri County sank into this enterprise of $600,000 and future earnings. The hinge has something to do with mitigation. It is one thing to say, as Tri County does say, it would have cost us a million dollars to save $600,000 because we would have had to buy the equipment and wait out an appeal.

That's perfectly understandable and maybe a complete defense to the mitigation claim with respect to the monies that were spent and lost; but for Tri County to make that decision, walk away from this, and then go for all of the future earnings without sinking the money into the appeal and going the next step to mitigate or to hang in there in a way that would permit them to pursue future damages may -- I say "may," because I'm not ruling at this time -- may as a matter of law mean that they're not entitled to future profits.

So my view of the future profits question at this point is that the evidence -- although I have to say, Mr. Emig, you did a very careful workmanlike job of putting in all the elements of that spreadsheet. Still what you have is a spreadsheet; you have a pro forma, without, it seems to me, very good proof either that the company could actually start up and do it or that there was a market for the numbers in the spreadsheet. And secondly, as I say, I've got this problem with mitigation. * * *

There's a line in your expert's report about how the competition is driving down the price per ton until it just covers operating costs.

MR. EMIG: Uh-huh.

THE COURT: And that that has driven one of the competitors out of business because he tried to take on too much. He didn't cover his operating costs.

Your numbers do a lot more than cover operating costs. They cover operating costs and return a profit of over 50 percent.

MR. EMIG: Right.

THE COURT: There's a query whether your own evidence establishes that you really have a market-competitive product here. So I hear you. Tri County digs the stuff up itself, trucks it someplace.

MR. EMIG: That's right.

THE COURT: Whether it can -- whether it can sell its own services at that price and deliver that profit is another question that I don't really think is what -- I think what I'm inclined to do is to let the jury decide how speculative that is and then go back and look at it with the luxury of a little hindsight and determine -- and if they -- if they think it is not too speculative, then, of course you have a leg up, but then I

will have to decide how speculative it is as a matter of law and whether they should have had the case in the first place.

Testimony of DCRA Inspector Juan Berrayarza

[DE 112, pp. 342-47 -- Direct Examination]:

A. I am employed by the District of Columbia as a zoning inspector for 27 years. * * *

Q. I direct your attention to what's been marked as Defendant's Exhibit 1. * * * What is that document, sir? * * *

A. This is a citation that was written on the premises of 2115 Bryant Street, Northeast * * * on the 7th of September, 1993. * * * I was there because my supervisor at that time, he sent me to make an inspection * * * based on complaints from the neighborhood that --

MR. EMIG: Objection.

THE COURT: Sustained. * * *

A. So I gave a full account of my inspection.

All right. The building had been occupied as an office on the front, and in the back was a building that was a big room that was full of soil, a big pile of soil. So I get in there and I'm trying to take a picture of the soil, you know, because my Polaroid camera and the picture never came out because the room was so dark.

So when I was there, I had some eye irritation because the fumes, the stink was coming out from the soil.

THE COURT: Overruled.

BY MR. BOLDEN:

Q. Okay. When you went to the premises, what, if anything, did you do?

A. So I got -- because the door was opening and I'm trying to see what was there. It was -- there was nobody in the building because the office had been locked.

Q. Okay. Did you -- did you draft that citation, sir?

A. Yes, sir. I wrote the citation when I went back to my office to check on all the records to see if there was a certificate of occupancy for this use, and I couldn't find anything in the file. So I proceeded to write a citation on the -- based on the regulation of the D.C. Code. * * * That regulation was 3203.1, building occupied, industrial soil remediation business without a certificate of occupancy. * * *

Q. What is a certificate of occupancy?

A. There is such a certificate that the zoning regulation required to have use of any property in D.C., any other use, or single-family dwelling is supposed to have a certificate of occupancy in the city. That's the regulation. * * * Without certificate of occupancy, there was subject to a fine. * * *

Q. Okay. And what does the citation require that Tri County do?

A. Well, they must have it on file in order -- well, they -- they -- right to operate the business until all the inspection has been performed, you know. They had to have a building inspection, plumbing, electrical, zoning, fire. They were in -- when they responded, has been approved, they can obtain a certificate of occupancy after

paying for the fee. They can operate the business. * * *

Q. Was there a fine associated with that citation, sir?
A. There was a fine.
Q. $500 fine?
A. Yes, sir.

[DE 112, pp. 348-50 -- Cross-examination]:

Q. Isn't it correct that Tri County could have paid that ticket for $500; is that true?
A. They should have been paying after all these years.
Q. They could have at any time paid that ticket; is that correct?
A. Correct.
Q. Now the second question I have is this.
A. Uh-huh.
Q. They could have either removed the soil --
A. That's right.
Q. -- or they could have gotten a certificate of occupancy?
A. Correct. * * *
Q. Either of those two things plus payment of the ticket would have resolved this entire problem; is that true?
A. Exactly.
Q. Now, you get a certificate of occupancy * * * when you complete your renovation on the building?
A. That's right. * * *
Q. You go out and you look and you make sure that all of the work that they say they're going

to do in their building permit application has been done correctly?
A. Exactly.
Q. That's all? Then you get your certificate of occupancy; that true?
A. Correct, if they comply with the zoning regulation.
Q. Well, they wouldn't have gotten the -- if they weren't in compliance with the zoning, they wouldn't have gotten the building permit in the first place?
A. Right. That's right.

Testimony of DCRA Inspector Phillip Thomas

[DE 112, pp. 351-55 -- Direct Examination]:

A. I'm a construction inspector with the District of Columbia. * * * The Department of Consumer and Regulatory Affairs.
Q. How long have you been employed with the Department of Consumer and Regulatory Affairs?
A. 16 years, sir. * * *
Q. Directing your attention to the month of September 22, 1993, did you have an occasion to visit 215 [sic] Bryant Street, Northeast?
A. Yes, sir. * * *
Q. What did you see?
A. I saw someone was storing a lot of soil in the building. * * * There was a gentleman I spoke to. * * * I asked him who's in charge. He said his boss was not there.

BY MR. BOLDEN:

Q. Did it appear he was working there?

A. He was working there, sir.
Q. What was he doing, sir?
A. He was by the weight station.
Q. On that day, what, if anything, did you do at 2115 Bryant Street?
A. I was told to issue a stop work order.
Q. Why was that, sir?
A. Because there was no CO for the job, what they were doing on the site, sir.

THE COURT: Was no what, sir?

THE WITNESS: CO, certificate of occupancy for the building.

BY MR. BOLDEN:

Q. What is a certificate of occupancy, sir?
A. Sir, in the District of Columbia before you -- before you could use a building for any business, you are supposed to have a certificate of occupancy.
Q. And did you notice or did you observe whether the building was being used for business?
A. It was being used for business, sir. * * * Sir, I saw that -- the dirt, I saw the weight station, the guy was in the weight station there. * * *
Q. I show you what has been marked as Defendant's Exhibit No. 5. * * *
A. It's a stop work order for no CO.
Q. Okay. And did you sign that document, sir?
A. Yes, sir. * * * I served a copy of the stop work order to the gentleman. I gave it to him and instructed him * * * he could appeal the stop work order. I said, from now on you are stopped from what you are doing here. I said, you could appeal the stop work order by talking to Mr. Vincent Ford, my program manager.

Q. Did you post a copy of that?
A. I did post a stop work order on the building. * * * It's a big yellow copy, sir, bright orange.

[DE 112, p. 361 -- Cross Examination]:

Q. So either they appeal it, they take the soil out, or they get a certificate of occupancy? Any one of those three things, assuming the appeal is successful, and your stop work is gone?
A. Yes.

Testimony of DCRA Employee Lennox Simon

[DE 112, pp. 362-67 -- Direct Examination]:

A. I'm employed in the Office of Adjudication, the Department of Consumer and Regulatory Affairs. * * * The Office of Adjudication is the adjudicative arm of the department. We conduct all of the administrative hearings under the jurisdiction of the DCRA.
Q. I show you what's been marked as Defendant's Exhibits 2 and 3. * * *
A. The first exhibit is an official decision and order of the Office of Adjudication which was issued by Attorney Examiner Rohmular Quander. * * * It was issued on October 25, 1993.
Q. What was the nature of that proceeding, sir?
A. This was a matter that came before the office on the operation of a business in the District of Columbia without a valid certificate of occupancy. * * * The hearing was on October 13, 1993.

Q. And what occurred at that hearing, sir?
A. Looking at the official record of hearing, the respondent failed to appear at that hearing. The inspector who issued the citation appeared and gave testimony under oath as to his observation of the location and what he saw on the day of infraction, which was September 2, 1993.
Q. Okay. And did the Court decide the case?
A. Yes, it did. Also looking at the other document, which is entitled "Capsule," it shows there were several attempts made by the Office of Adjudication to contact the respondent telephonically. There were calls backward and forward, and the respondent also wrote a letter to the department indicating that -- well, basically denying that there were any business activities being conducted at that location.

And based on that information, Attorney * * * Quander proceeded with the hearing. He found there was adequate notice of the violation and proceeded with the hearing.

Q. What, if anything, did he determine?
A. Well, based on the information provided by the inspector, the zoning inspector, he found the respondent liable, upheld the original fine, which was $500. He then assessed a penalty for the respondent's failure to appear at the hearing of a thousand dollars, and he also assessed $25 in court costs for a total of $1525. * * *

The order was mailed out to the respondent on November 3rd, 1993. I have a certificate of service of that as well. * * *

Q. And does the capsule summary itemize the dates and times when attempts were made to notify Tri County?
A. Yes, it did. It shows that on November 30, 1993, on December 7, 1993, December 13, January 6 of 1994, and January 10 of 1994 there was attempts made to contact the respondent.
Q. Okay. I show you what's been marked as Defendant's Exhibit 4. * * *
A. That is a letter from the office of the controller, which is another branch within the Department of Consumer and Regulatory Affairs, and that office is charged with collecting all fines and penalties for the department. * * * It is dated January 12, 1994. * * * Basically it informs the respondent that he had a final decision, an order was issued on this matter, assessing $1525 in fines. There has been no appeal taken from that decision, which means you have 15 days in which to appeal. It is now final, and the respondent has to make payments on that; otherwise, the matter will be referred over to the Corporation Counsel for criminal prosecution to enforce that judgment.
Q. And is there additional language in that document?
A. Yes. To cease and desist the operation of the business until such time as a certificate of occupancy is issued for that particular activity that respondent was engaged in. * * * It also, as the act -- the civil infractions act provides the -- for the suspension of various licenses and certificates unless the fine is paid, so it is an

enforcement tool used to -- by the department to collect the fines assessed.

[DE 112, pp. 372-75 -- Cross Examination]:

THE COURT: * * *

This form that is Exhibit 2 says at the bottom of the back of it "Respondent's failure to appeal this decision or to arrange for payments of all fines, penalties, and costs within 15 calendar days of service of this decision shall operate to suspend automatically the license or permit until the assessment is paid."

What does this mean "operate to suspend automatically the license or permit"?

THE WITNESS: * * * [W]hat that means, Your Honor, is that on the 16th day the license or permits or certificates will be suspended by operation of law.

THE COURT: And does another piece of paper have to issue to get that done?

THE WITNESS: No, Your Honor. * * *

BY MR. EMIG:

Q. But they don't indicate in this letter that any permit has been suspended, do they?
A. They don't. They didn't. But the decision and order speaks for itself. It says it would be automatically suspended, and that decision and -- the decision and order was mailed to the respondent.
Q. Okay. If -- how is that matter corrected and that suspension lifted?
A. Once the respondent has paid the fine, penalties, whatever that's due, then that license permit certificate would be reinstated.

Q. That's all that's required?
A. That's all that's required.
Q. To pay it?
A. It's just an enforcement mechanism to collect the fines, penalties, et cetera.

Testimony of DCRA Director Hampton Cross

[DE 112, pp. 377, 394, 396-99 -- Direct Examination]:

A. I was the acting director of Consumer and Regulatory Affairs from, I believe, September of '93 to, I think, January of '94. * * *
Q. Okay. And the Director?
A. From January of '94 to August of '97. * * *
Q. Why was that letter [letter dated October 15, 1993] sent to Tri County, sir?
A. My best recollection is that it was sent to -- well, to establish a process which would afford -- which would resolve the issues that had arisen, to establish a process and to get the necessary information from Tri County.
Q. Okay. And do you know if Tri County responded to that letter?
A. No, they did not. * * *
Q. What do the initials CA, what is that commonly known as in the District of Columbia government, sir?
A. City administrator.
Q. Who was the city administrator at that time?
A. Mr. Robert Mallett.
Q. What is Mr. Mallett's responsibilities in the District of Columbia government? * * *
A. As the city administrator, he was responsible at that time for the overall operation of the Dis-

trict of Columbia government. * * * I have no recollection of any conversations with Mr. Mallett regarding Tri County. * * *

A. In December of 1993, I recall being advised by the staff that we had not received any response to our letter * * * dated October 15, 1993. And the question was, having received no response, what should we do.

Q. Okay. And what was done?

A. We issued them a letter revoking the building permit. * * *

Q. Okay. What is the date of that letter, sir?

A. December 6, 1993.

Q. At paragraph 3, paragraph 4, sir -- * * * will you read that, sir?

A. "Furthermore, the original environmental approval was based on information provided by you on the environmental impact screening form stating that your facility would be over 700 feet from the nearest residential house. You failed to bring to our attention the fact that there is a single-family residence directly across the street from your facility less than a hundred feet away. We are concerned that this home, as well as the proposed DHCD housing project, are much too close to your facility to not be impacted by the emissions from the treatment process and potential emissions from contaminated soil stored at the facility or transported throughout the neighborhood."

[DE 112, pp. 404-07, 412-13 -- Cross Examination]:

Q. You do not know when that October of '93 letter was sent to Tri County whether or not

you had already received that particular information that is listed in your letter?

A. At the time the letter was sent, my best professional information at that time was that we did not have the information that we were requiring in this letter. * * *

Q. Are you aware of any legal authority that would permit you to ask for more information from a permit holder after the permit has already been issued?

A. I don't know any specific code citation, sir, but as a professional, when matters come before you that involve life safety --

MR. EMIG: Objection, Your Honor. I move to strike that.

THE COURT: You asked the question.

THE WITNESS: When matters come before you that involve life safety as a public official, you have a responsibility to ask for additional information. * * *

Q. Is it true, Mr. Cross, that the Board of Appeals and Review is merely the reviewing agency that does the will of the mayor?

A. That's not correct.

Q. Did you ever testify to the contrary?

A. My previous statement is that I do not recall testifying to the contrary.

Q. Is it true that there are two ways of handling the situation before the Board of Appeals and Review; one, that you could ask the board to take a different position or, two, that the mayor or chief of staff, Robert Mallett, could tell the Board of Appeals and Review to reverse its position?

A. Sorry. Could you repeat your question.

Q. Is it true that the mayor or the chief of staff, Robert Mallett, could tell the Board of Appeals and Review to reverse its position?
A. That's not true.
Q. Did you ever testify to that?
A. My best recollection is that I did not testify to that.
Q. Let me show you a portion of your transcript from your testimony in the Samaritan Inns case. * * * Is it true that you, in fact, testified differently before the -- this Court?
A. Based on that transcript, it is correct. Based on that transcript, I did say that.

[DE 112, pp. 414-18 -- Redirect Examination]:

A. The Board of Appeals and Review is not a -- is an independent -- is an independent agency. * * * It doesn't do the bidding of anyone. It is an independent agency, making independent judgments.
Q. So you were mistaken in that day?
A. I was absolutely mistaken. Absolutely. * * *
Q. Concerning adverse environmental impacts, if new information came to your attention which you determined had impact, environmental impact on a project such as the one Tri County was involved in, what, if anything, would your agency do, sir?
A. It depends, counsel, on where the project is. * * * If the -- if the project is -- the proposed construction is completed, then you would take steps to delay or suspend issuance of any final approvals or -- so that to make sure that the project did not go -- did not go into effect until

we had assured ourselves that any -- that any -- that there would not be any adverse impact on the surrounding area. * * *
Q. Why did you send the October 15 letter to Tri County? * * *

THE WITNESS: As a follow-up to the meeting where I -- where I moved to suspend the permit to establish a process which -- a fair process which would allow Tri County to provide us with the information to resolve the questions about whether or not there would be any adverse impact on the community.

Testimony of DCRA Chief James Sweeney

[DE 112, pp. 419-29 -- Direct Examination]:

A. I'm employed at the District of Columbia government, Department of Health, Environmental Health Administration. * * * I've been with the District government for a little over 25 years. * * * Right now, I am chief of the hazardous waste management division within the Environmental Health Administration. * * *
Q. I show you what's marked as Defendant's Exhibit 7. Have you seen that document before? * * *
A. This is a document called a supplemental environmental questionnaire. * * * It is part of the building permit application.
Q. Okay. And did there come a time when that document was presented to you?
A. Yes. * * * [T]he signature of the person who filled out the form is Calvin Franklin. * * *

Mr. Franklin was a representative of Tri County Industries, who had applied for the permit to do this project. * * *

Q. Okay. Now, I draw your attention to, I believe it is page 2, the last question on page 2. * * * What does that say, sir?

A. The question is, "Will the proposed project result in an increase in vehicular traffic in the area surrounding the project?" And it is -- someone has written next to that question, "A little employee." And the question is answered "Yes."

Q. Okay. And did it come to your attention subsequently that there was somewhat more than a little employee? * * *

A. I can't remember exactly when, but the more than a little employee parking meant that there would also be trucks coming into and out of the neighborhood with contaminated soil in them.

Q. I show you what has been marked as Defendant's Exhibit 8. Do you recognize that document, sir? * * *

A. This document was written in response to a meeting that was held on September 20, 1993, where we received some information concerning the area around 2115 Bryant Street, Northeast. This information had to do with the proposed construction of a housing project by the D.C. Department of Housing and Community Development very close to the proposed facility. * * * It is addressed to Mr. Glenn D. Selzer, president, Tri County Industries.

Q. Okay. What sort of things were you asking for in that letter, sir?

A. * * * There are 10 things we ask for. I will paraphrase them so we don't waste too much time.

We are first asking for the total cost of the proposed project, including the cost of the remediation equipment to be installed, the cost of construction materials, and the labor costings.

Number 2, the expected amount of soils in tons to be processed per day at the facility.

Number 3, the number of truck trips into and out of the facility per day.

Number 4, the proposed routes of the trucks through the neighborhood into and out of the facility.

Number 5, the proposed hours of operation.

Number 6, current conditions of the facility property regarding pest infestation, dust, and odor.

Number 7, contingency plans, if any, for the control of pests, dust, and odor.

Number 8, proposed means for washing the facility and methods for disposing of wash water.

Number 8, a typo I find four years later. The second number 8, actually number 9, I guess, is the distance of the facility from the adjacent property proposed for development. There's some instruction here on how to measure that distance. * * * It finishes with, "Thank you for your timely submittal of this information."

Q. Do you recall that Tri County responded to that letter, sir?

A. They did not.

Q. Okay. Directing your attention to the request concerning truck traffic, * * * was there a reason for asking that question, sir?

A. Well, originally, when we first looked at the site in their original application, * * * we weren't concerned too much with truck traffic because it was our understanding that there were no residences nearby.

However, through this meeting on September 20, we found that there were going to be the proposed housing project. We also went out and actually looked at the site and found that there were residences directly across the street from it. So we were extremely concerned about trucks going back and forth, both from a health, or public health standpoint and from a public safety standpoint. * * *

We were of the understanding that the closest residence was 700 feet away, which would put it down here or out here somewhere (indicating).

Q. What was the basis for that understanding?

A. The letter we received during our initial review of Tri County's environmental impact screening form. They stated that the closest residence was 700 feet away.

Q. And, in fact, how far away is the closest residence?

A. Right here, probably 50 to 70 feet directly across the street from the entrance.

Q. And what other residences would you estimate are closer than 700 feet away?

A. I would say every residence * * * that's in blue here is within 700 feet. And possibly these

yellow residences too; I haven't measured that, so I don't know. * * *

Q. Why were you concerned about trucks on Bryant Street?

A. Well, for health reasons and safety reasons. You have homes, you have children that are using the streets all the time.

There's a park here. Kids would be crossing the street to get to the park all the time. We're concerned about safety there.

As I stated before, we have the trucks going by with contaminated soil in them. That contamination tends to volatilize out of the soil, and it would be into the atmosphere, what we call the ambient atmosphere around the area, and it could possibly impact the health of the people in the area.

[DE 112, pp. 435-36, 439-40 -- Cross Examination]:

Q. You concluded, based upon your review and your discussions with other DCRA officials, that this project would not eminently and substantially affect the public health, safety, and welfare; is that correct?

A. That's correct. * * *

Q. Are you aware that the -- in their pleadings in this case, the District of Columbia has admitted that they did an extensive review of the plaintiff's application for this facility including visits to the site? * * *

A. I suppose I am, yes. * * *

Q. In your opinion, would there be an escape of the contaminants from the petroleum -- the soil

with petroleum in it into the atmosphere from this facility?

A. If the soil was kept inside the facility, in my opinion, there would not be an adverse emission of contaminants from the soil.

Q. So that the facility itself would not have -- the operation of the facility would not have an adverse effect on the homes that are surrounding the property?

A. As far as keeping the soil inside the building? That's correct.

Q. And the operation, the intended operation was for the plant and the soil to be inside the building?

A. That's what I understand, yes.

Q. When this permit was suspended by Mr. Cross, Mr. Cross directed you to write to Tri County Industries and to get more information; is that correct?

A. I don't know if it was Mr. Cross or Mrs. Bishop that directed me to, but one of them did.

Q. That was the reason that you prepared and sent out your letter of October 15, 1993, --

A. That's correct. * * *

Q. Would items 1 through 9 in that letter, Mr. Sweeney, normally have been looked into by DCRA in connection with their application -- with the application for a building permit that Tri County filed?

A. We expect someone to ask these questions, yes.

Q. Someone from DCRA?

A. Yes.

Q. Before you sent this letter out to Tri County requesting further additional information, did you ask anyone in DCRA regarding their investigation to see if they already had this information?

A. Not that I can recall, no. * * *

[DE 112, pp. 432-35, 441-42 -- Cross Examination]:

Q. Mr. Sweeney, isn't it true that all of your concerns about this project are matters that should be considered when a building permit application is filed?

A. Yes.

Q. You yourself do not review issuance of building permits; is that correct?

A. Only one very small portion of it.

Q. You did not review the Tri County Industries application for a building permit?

A. No, I did not.

Q. What you did, essentially, I think you testified, was to coordinate the review of the different branches of the Department of Consumer and Regulatory Affairs?

A. Different branches within the Environmental Regulation Administration of the Department of Consumer and Regulatory Affairs.

Q. If you would take a look at Defendant's Exhibit No. 6, what is that, please?

A. That is an application for construction permit on private property.

Q. When was that application filed?

A. July 1, 1992.

Q. That's the Tri County application for this project?

A. That's correct.

Q. Okay. And the form of this application is on the last page, they have various departments

that have to sign off indicating their approval; is that correct?

A. That's correct.

Q. Does your signature appear anywhere?

A. Yes, it does.

Q. Where?

A. Under number 6 for Environmental Regulation Administration, where it's checked "environmental policy review."

Q. When did you sign off on this?

A. November 6, 1992.

Q. So from an environmental policy review standpoint, you approved on November 6 the issuance of this building permit?

A. Based on the information we had at the time, yes.

Q. Okay. During this time, you also knew, did you not, that dump trucks were going to be carrying the soil into this facility?

A. Yes, I did.

Q. And you knew from the application that the plant intended to treat approximately 75,000 tons of soil on an annual basis; is that correct?

A. Where on the application does it say that?

Q. Well, why don't we look at Defendant's Exhibit 10. * * * Page 3. * * * What does that indicate?

A. It indicates that there will be a quantity of 74,880 tons per year.

Q. Okay. So when you signed off on this application, you knew, A, that they were going to use dump trucks, and you knew, B, how much soil they intended to process; is that correct?

A. No, that's not correct. I had not seen this permit for constructing and operating process equipment at that time.

Q. Okay. Well, why didn't -- did you request to see it?

A. No, I did not.

Q. Who had it?

A. Who had it at that time? Mr. Wamsgans from the Air Resources Management Division.

Q. And he was -- that's part of DCRA also?

A. That's part of DCRA. His Division was reviewing this permit application. * * *

Q. Are there other means of access to the property other than Bryant Street?

A. I didn't search for any; but as far as I can tell, there are few, if any.

Q. What about Lawrence Avenue?

A. I suppose you could maybe come off of, I guess, Montana Avenue or 18th Street and get onto Lawrence, I'm not sure.

Q. Why don't you tell the members of the jury the type of businesses that are on Lawrence Avenue. Are they homes?

A. As far as I know, there are not homes there.

Q. What are there?

A. Junk yards, trash facilities; I don't know every one down there.

Q. Commercial and industrial businesses?

A. It's commercial and industrial.

Q. Do you know if the applicant planned on having the dump trucks covered when they came into the facility?

A. According to the information from the applicant, yes, they would be covered with tarpaulin.

Q. Do you know where the soil equipment was to be located within the building?
A. Exactly? No. * * *
Q. Did you ever observe any trucks go into the facility?
A. At the time I was there, no.
Q. So you don't know which route they actually took, do you?
A. No, I don't.

[DE 112, pp. 442-43, 446 -- Redirect Examination]:

Q. Mr. Sweeney, in your letter of October 15, 1993, * * * you requested information concerning the proposed routes of trucks through the neighborhood into and out of the facility. * * * And why did you request that information, sir?
A. 'Cause we didn't have it. * * *
Q. And if Tri County planned to burn 25 tons per hour roughly, how many trucks would come through that neighborhood each day? * * *
A. 20-ton truck? 25 tons per hour? A little over a truck per hour. * * *

THE COURT: If the District had already decided that there was no environmental impact statement requirement, why is it that you referred to a provision of this environmental impact statement requirement statute to send this letter out?

THE WITNESS: I think further on in the law it talks about supplemental information; and if we determined that there may be other information or new information concerning the

project, we can go back and request further information from them, the applicant.

THE COURT: Did you have any authority for asking the questions in that letter of October 15, 1993 except the authority vested in this Title 6, Section 983?

THE WITNESS: None that I know of.

Testimony of BAR's Executive Officer Francine James

[DE 112, pp. 448-50 -- Direct Examination]:

Q. * * * And you're executive officer of what office?
A. The Board of Appeals and Review. * * *
Q. Pursuant to the regulatory scheme of the Board of Appeals and Review, it there a provision * * * for emergency appeals?
A. There's a provision for the emergency appeals in the rules of procedure. * * *
Q. What about stay orders, stay orders of orders issued by agencies; is there provisions for that as well there?
A. There is a provision for the chairperson to hear a stay order only if it has been denied by the agency. * * *

THE WITNESS: Motions for stays are not set down for hearing. Motion for stays are reviewed by the chairperson. He determines whether he would grand [sic] the stay. If he does not grant the stay within 30 days, then the decision from the director of the department becomes final.

[DE 112, pp. 451 -- Cross Examination]:

Q. Isn't it true that it would be speculation on your part to give us an opinion as to how long it would take an emergency appeal to be resolved by the board?
A. To be resolved?
Q. Yes.
A. Or to be heard?
Q. To be resolved.
A. Yes. That's speculation.

Colloquy: Court and Counsel

[DE 112, pp. 452-54]:

THE COURT: This is Siess? * * * This is the expert?

MR. BOLDEN: Yes, sir. * * * Well, it is relevant to two things. First of all, the plaintiffs have put on a person who explained the process. He concluded his testimony with that the process is a safe -- as safe as pumping gasoline at a gas station.

THE COURT: He did say that.

MR. BOLDEN: I think that it -- fairness would dictate the District have an opportunity to put on its views as to * * * whether or not it is as safe as pumping gas in a gas station. * * * Secondly, it is our view that certain kinds of -- certain parts of this project would have required that it be stopped anyway.

THE COURT: Like what?

MR. BOLDEN: Well, the process, the closeness of the proximity of the facility to the

residential facilities, residential homes, the trucks going through the neighborhood.

THE COURT: Well, you've got a little problem. You just had a witness on the witness stand who said he knew of no authority for asking the questions in the October 15 letter except under the D.C. Code section.

I don't read the D.C. Code section the way he reads it. The D.C. Code section relates to environmental impact statements, period. Environmental impact statements were waived, were they not?

MR. BOLDEN: They were waived based upon the information that DCRA had at the time. The Court will recall there has been evidence that some of the information was incorrect, some of the information was misleading, and that there was -- there were new -- new information came to us which showed -- dictated that we proceed in a fashion which protects the residents, that there was --

Proposed Testimony of Alfred A. Siess

[DE 112, pp. 455-62 -- Direct Examination]:

A. I'm presently employed as an economic environmental consultant, and my background is a degree in civil engineering, and I have an MBA and 40 years of experience.
Q. With respect to the process of cleaning contaminated soil, are you familiar with that, sir?
A. Yes, I am.
Q. Okay. And how familiar are you with that process, sir?

A. Well, I've been involved in a great many -- as a consultant in a great many of these low-temperature thermal treatment unit applications. I have reviewed applications for probably two dozen or more companies, including about six or eight in Pennsylvania that use Gencor Thermotech equipment.

Q. And are you familiar with the process?

A. Yes, I am.

Q. Would you just briefly * * * describe the process for --

A. Well, the process basically is considered as a viable alternative for doing on-site remediation of certain very well-defined contaminated soils. It is basically just a process where you drive off the volatile compounds and then treat them in some way, either by passing the gases through a carbon filter or by burning them in an afterburner, oxidizing the gases.

The process is not suited for many different types of contaminated sites, including some petroleum-contaminated sites.

Q. There's been testimony here that the processing of contaminated soil through this process is as safe as pumping gasoline in a gas station. Do you agree with that, sir?

A. Absolutely not. First of all, the -- pumping gasoline at a service station is not necessarily a very safe endeavor. * * *

The remediation, using any type of system that requires excavating the soil, and particularly systems that require adding heat to the soil such as low-temperature thermal treatment, add a host of other problems that make it much

more serious of a threat to public health and the environment. * * *

Well, first of all, it is generally recognized that the thermal treatment of petroleum-contaminated sites which came about in 1984 when EPA established their underground storage tank program, is generally considered that the treatment should be on-site with mobile units.

The reason for that are, first of all, if there were no dangerous materials in the products, the gasoline and whatever, there would be no need to remediate at all.

But the UST program established that left in the ground, petroleum products are a grave cause for concern. That happens several different ways. One, the volatile organic compounds will be emitted to the atmosphere even from the type soils without any -- any action; but mainly there's a concern that the volatiles will migrate down to the groundwater, and for that reason, it is necessary to take action where you have contaminated soils.

If you're going to use a system such as low-temperature thermal treatment, even on site, it is more of a problem than come of what they call in-situ measures, where you actually remediate without excavating. It is much preferred to use in-situ processes such as air sparging or vacuum extraction in order to avoid excavation.

If you excavate these petroleum-contaminated soils, you immediately have what is called airstripping, where the volatiles are released to the environment anyway.

Q. Have you reviewed the application submitted by Tri County in this case? * * *

Q. Such as it was. It was not very complete, but I did review it, yes sir.
Q. Why do you think it was not complete, sir?
A. Well, there are a number of such reasons. They mention, for example, that they have provided stack tests with their application. On further review, it appears that the stack test may be completely meaningless.

First of all, they were not conducted * * * at the Bryant Street site because there was no equipment there at all.

I also understand that they were sent to the Bryant Street site and stored on site.

Q. What was that, sir?
A. The contaminated soil sample that was going to be used for the stack test. My understanding is that they were sent to the site and remained on the site for a long period of time. This would be completely inappropriate for running any kind of a meaningful stack test.

First of all, it may or may not be representative of the types of soils they would be dealing with, but also, chances are it would be airstripped to the point of not giving a meaningful comparison of the problem. * * *

The airstripping of the contaminants in transportation and in handling again at the site, and in handling again when they are introduced to the thermal processing unit, the Midwest Institute has done studies where they have deliberately taken soil at a central treatment unit and spiked the soils with volatile organic compounds.

They have found that from the time they have spiked the soils until they finish loading

them into the feeder hoppers or conveyor belts for the treatment units, they have lost as much as 95 percent of the volatiles to the atmosphere. * * *

Q. When you refer to airstripping, what do you mean by that, sir?
A. The volatile compounds * * * evaporite [sic] from the soil.
Q. What is the effect of that?
A. Well, you're dealing with hazardous chemicals, xylene. toluene, benzene, all products of gasoline.

There are a total -- the American Petroleum Institute did studies on low-temperature thermal treatment. They * * * identified 59 listed hazardous constituents in petroleum refinery products, in addition to finding that low-temperature thermal treatment was completely ineffective in dealing with heavy metals.

These gasolines and other contaminants on UST sites contained about 12 or 13 very toxic, heavy metals, including lead, cadmium, and other constituents.

Low-temperature thermal treatment only aggravates the problem because the API found that the lead was being concentrated in the control equipment, in the bag houses.

The process that Gencor Thermotech uses * * * sends most of the soil directly from the drier to the cooler, where it becomes, quote, "clean soil" and is what they call product.

But also the dust and the gases that are driven off at the drier are routed to a bag house, and the dust is collected in the bag house, where it accumulates lead and other

heavy metals, and then it is returned to the so-called clean soil.

So you're actually accumulating products and then returning them to the so-called clean soil.

Q. Is there any danger of spontaneous combustion?

A. There is. * * * What I was getting on this was that my understanding was that at some sites, the Gencor equipment uses Cedar Rapids equipment for some of the things like the bag houses. Cedar Rapids * * * have stated that it is very dangerous if you allow the volatile gases to approach 25 percent of the lower explosion limit in these units; and there have, in fact, been fires and explosions in low-temperature thermal treatment plants. So that's a related worry. * * *

[DE 112, pp. 462-65 -- Cross-Examination]:

Q. Which DCRA officials that approved the permit in this case have you spoken with?

A. I have not spoken with anybody, to my knowledge. I said hello to Hampton Cross.

Q. You're aware that DCRA reviewed this project in terms of the environmental effects that could be expected; is that true?

A. That's true, sir. What I have stated when I submitted the expert testimony form was that I believe that they were -- they were handicapped by not having complete information in the application and that, indeed, they were correct in asking for more information. * * *

Q. Well, if they didn't have the necessary information, * * * isn't that their responsibility to go out and get it before they issue a permit?

A. I think that's a legal question. I do know that in Pennsylvania, we have very stringent requirements for obtaining permits for this type of work.

Every one of the applications that use Gencor equipment, and also several that use Tarmac equipment and Aztec equipment, every one that I'm aware of that -- every one that I worked on, which is more than a dozen in Pennsylvania, was rejected because of not meeting requirements for protecting the health, safety, and welfare.

Q. Uh-huh. In this particular case, you've indicated that the machine is not suitable for certain types of heavy metals; is that correct?

A. That's correct. sir.

Q. And if a company tests the soil before it brings it to this thermal desorption plant, it can evaluate whether or not it has the presence of heavy metals; is that correct?

A. It is theoretically possible to conduct the proper site analysis to determine the levels of total metals and the levels of different metals, yes. * * *

Q. * * * If you have a proper sampling, a sampling protocol being followed, you can be pretty confident in terms of the results of those samples; is that correct?

A. Usually the site investigations are determined before you decide on the method that you're going to use for remediation. * * * The reason for that is that low-temperature thermal treat-

ment is not the proper method to use even for on-site remediation, depending on the soil characteristics and the contaminants that are at issue; but when you go to the central thermal treatment of a great many different sites, the problem then becomes how does the treater, the remediator, ensure that the generators are not sending hazardous wastes to them.

In my experience, the protocols for determining at the treatment site whether or not the materials that are being received are, in fact, nonhazardous have left a lot to be desired. * * *

In Pennsylvania, we have questioned the people who say they are the treatment people and that they will ensure that no hazardous materials enter the processor. We have asked them simply, how do you do that. The protocols that are in effect usually say that you have to take a TCLP sample from six locations in a 500-ton pile of waste at a depth of six inches or a foot.

It is simply impossible, in my opinion, to have a proper testing at the site when you're taking four ounces of soil from a 500-ton sample.

[DE 112, pp. 466-78 -- Colloquy: Court and Counsel]:

MR. EMIG. As to the safety comment by Mr. Dishian, I think that was brought out during cross-examination. But the real problem I have with Mr. Siess' testimony, Your Honor, is Mr. Bolden's client has admitted in this case that it has done a full and complete review of

the effects of this project, and what we have with Mr. Siess is an environmental point of view saying, well, this could be a problem, this could be a problem, these aren't the best machines in the world.

Well, if there's a violation of the permit, I think that's speculation. If they start bringing any hazardous waste, they don't sample enough, that's a technical violation of their permit.

But I don't see really where he -- his evidence, testimony, goes on any of the issues in this case. In terms of mitigation, damages, or mootness, I don't think it really is specific to this -- the facts of this case.

He has not spoken with the regulators to know what they did. I'm just not sure there's relevance that would help the jury. It would just prejudice them to the extent of bringing in opposition to a project. * * *

THE COURT: * * * What is his testimony going to do by way of assisting the jury to understand the issues in the case? That's what expert witnesses are for.

MR. BOLDEN: Well, first of all, he's going to explain the process from our perspective. And he is going to show why a government should be concerned about that process and why additional information was necessary, and, in his view, why additional proceedings on this matter were necessitated.

Contrary to what counsel points out, Tri County had not completed the testing protocol; * * * they did not have the certificate of occupancy. So there were still considerable steps to

go before this was an up and running and operational business.

And we believe, we maintain that the District, given new evidence, given issues that indicated there had been some misrepresentations in applications, should have second look at this and either try to resolve them or go through the process to halt the project. That's essentially what our position is.

THE COURT: Let me just rehearse where we are here. On December 22, 1992, the administrator of the Department of Consumer and Regulatory Affairs Environmental Regulatory Administration advised Mr. Selzer that an environmental impact statement for the project would not be required pursuant to the conditions of the District of Columbia Environmental Policy Act of 1989.

The letter said that even though an environmental impact statement is not required, the project is still governed by all other applicable District and federal laws and regulations and will be subject to normal reviews during the permitting and construction processes; and it said that construction and operation of the facility would be governed by the special conditions included in approval number 3411 issued by the Air Resources Management Division on December 11.

Those special conditions, which are Plaintiff's Exhibit 3, approve the construction and operation of a 25-ton per hour portable soil remediation unit, including a rotary kiln, a bag house, and an afterburner, in accordance with

submitted plans and specs subject to 12 enumerated conditions.

Now the enumerated conditions include, by the way, that the approved facility would not be operated to treat hazardous waste materials, including but not limited to organic solvents, PCBs, PVCs, but would be permitted to process only soil contaminated with gasoline, diesel oil, fuel oil, or kerosene.

So all this business about heavy metals that Mr. Siess had to talk about seemed to be off the reservation.

Now, what I hear Mr. Siess saying, essentially, is that they shouldn't have issued this permit. Enlightened places like Pennsylvania and California don't do this. But he's not in Pennsylvania or California, he's in the District of Columbia; and they did do that. They did issue this.

Now, I'm sorry if my question to Mr. Selzer [sic] about what legal authority he had for asking his -- for writing his letter gave you an answer you didn't want to hear, but I haven't heard anybody say yet what authority the District had for reopening in that October 15 letter the questions that form the basis for the -- for your argument here really that when push came to shove, the District was going to jerk this -- this permit. That's your Carey versus Piphus thing.

But unless the District of Columbia acted ultra vires, I haven't yet been shown how they could have reversed course on this process, having granted the -- having granted a permit on December 11, having waived the air quality

control on December 22, having issued a building permit.

Now I will grant you the possibility that a full-scale legal proceeding, perhaps one even brought by the community requiring some -- or demanding some reevaluation of this process, raising questions like the question Mr. Siess is bringing here, ventilating the objections of the community to dump trucks driving past children's parks, raising the specter, as you tried to do in your cross-examination, that who knows whether the truckers would put those tarps on the trucks when they really come through or not -- I would grant you that the proceeding of that kind might have had the effect of pulling this permit.

After-acquired evidence, a proceeding for fraud in saying it wasn't going to have much vehicular traffic, just a few employees; a proceeding for fraud; you told us there weren't going to be any houses within 700 feet. Look at all these houses; all that might have happened. But it didn't happen. * * *

I am going to hold that Mr. Siess' testimony is -- let me just review it. He was going to say that this process is not suited for some sites, but that's not the issue we're dealing with here, because we're dealing with dirt that is already going to be brought from other sites.

He's going to say treatment should be on site. Well, maybe it should, but this treatment plan was approved for the District of Columbia -- by the way, his testimony is not time limited, so you don't have any idea whether he's talking about 1993 or 1998, and that may make a

difference on whether in-situ treatment is more de rigueur today than it was in 1993.

I notice one of your experts -- I think it was DiRenzo -- had in his report something about this new biological process for eating up the little petroleum things. Well, I can remember from my days in private practice, they were just beginning to talk about using these enzymatic ways of doing third-stage recovery from oil wells and that sort of thing, and that's fairly new. I don't know if they were doing it in 1993.

He said the stack tests were meaningless because they were not conducted at Bryant. Well, the conditions of the grant, of the operating permit, were that there be stack tests conducted at Bryant. So that doesn't help us any.

Soil -- the soil samples would be airstripped as they were taken out of the hole. Well, that doesn't affect the neighborhood -- or airstripped by transit -- that doesn't affect the neighborhood, except in the last couple of blocks.

Airstripped by being handled inside the building? Well, you have Sweeney saying whatever is in the building is okay. He says waste handling is a problem if you send it to central treatment plants.

I guess that's what I've been talking about. He talks about heavy metals, xylene, toluene, benzene. I guess those are all constituent molecules of the basic gasoline that we're talking about, but they have covered -- as for the spontaneous combustion, that's a -- I don't

mean to diminish Mr. Siess' testimony, but that's an imaginary horrible.

I'm going to find that his testimony is wholly irrelevant. * * *

I'll tell you where it goes from there, Mr. Bolden. I think it segues into a ruling * * * that I am not going to permit the jury to find that the District of Columbia would * * * ultimately have denied the permit for this building to go forward, because I don't think there's any other basis for it.

Now, that does not take * * * out of the case the citation, stop work order, failure to pay the fine, failure to answer question, which I think of as analytically separate from this -- the public health and safety question.

But I think there is no evidentiary basis on which this jury can determine that -- that is, there is no proper evidentiary basis -- and I'm not going to let Siess -- Siess' testimony would not add to it -- no proper evidentiary basis on which this jury could find that in a Carey versus Piphus kind of finding that the District would have ultimately refused permission to go ahead with this project. * * *

MR. EMIG: I'm going to just put Mr. Selzer on for five minutes, Your Honor.

THE COURT: What's he going to say? What's he going to rebut?

MR. EMIG: He's going to rebut the access on Bryant Street and also the issue of the covered trucks.

MR. BOLDEN: Sorry, what was that?

THE COURT: Covered trucks.

MR. EMIG: The dump trucks being covered. I think there was testimony by Mr. Sweeney on that.

THE COURT: Well, if I'm ruling that issue out, what's the point of any of that rebuttal?

MR. EMIG: That's correct. Then in that case 'cause * * * the second question I would have, then, would relate to the October 15 letter, and also the follow-up to the December 6 letter of 1993, because Mr. Cross in the December 6, 1993 letter says, I'm going to suspend or I'm going to revoke because, A, you didn't respond to the October 15 letter, and secondly, because of likely significant environmental impacts.

I'm not -- that's really a prejudicial statement. He has no basis for it, and I don't think counsel should be able to argue that as a basis -- either of those as a basis for suspension.

THE COURT: I agree with that. What do you want to do with the exhibits?

MR. EMIG: I'd have it stricken and submit it to the jury. Page 2. * * *

THE COURT: * * * I'm going to grant the motion to strike the October 15 and the December 6 letters. I'm going to tell the jury that -- I don't know exactly -- basically. I'm going to tell the jury that the health and safety questions are out of this case and not to be determined by them * * *.

I'm still undecided as to what my ultimate decision is on the lost future profit question. But at this moment, I'm disposed to let the jury decide it in the first instance.

[DE 114, p. 493: Colloquy: Court and Counsel]:

> MR. BOLDEN: * * * And bear in mind that this case is not a traditional compensatory damage case. Mr. Emig filed that in Superior Court. That was dismissed.
>
> This is a civil rights case, and it is a procedural due process case, so it is a horse of a different color from cases in which someone is injured and they go to damages.

[DE 114, pp. 496-99 -- Defendants' renewal of their motion for judgment as a matter of law]:

> MR. BOLDEN: * * * Your Honor, I would like to renew the motions that the District made at the close of plaintiff's case concerning mitigation of damages and the issue going to future profits. I will not argue it again, as the Court has appeared to have ruled.
>
> I would like to raise one other area which I believe necessitates the dismissal of aspects of the plaintiff's damage claim.
>
> As the facts have shown on September 20, 1993, there was an oral suspension, a verbal suspension of the permit of Tri County to build. Subsequently, on September 22, there was issued a stop work order, a valid stop work order which wasn't challenged in any way. It had all the force and effect of the laws of the District of Columbia behind it.
>
> On October 25 there was an order issued by the Office of Adjudication of the District of Columbia which suspended by operation of law

> Tri County's permit to build and had all the force of laws of the District of Columbia.
>
> Your Honor, none of these orders are disturbed. They remain in place to this very day. It is the District's position that, as a matter of law, Tri County is entitled to no more than damages that flowed from the * * * September 20 suspension, which has been determined by the Courts to be invalid to September 22, which is the date of the stop work order. That stop work order cleared the deck of any damages that Tri County is entitled to; but even if the Court determines that the September 22 stop work order did not clear the deck, clearly, the order issued by the Office of Adjudication on September [sic] 25 cleared the deck of any damages that Tri County would be entitled to. * * *
>
> THE COURT: Well, Mr. Bolden, I hear that argument. It is -- I have to say -- a strong argument. It may be an argument that will persuade the jury that by some -- either on a mitigation theory or on your version of the mitigation theory, which is the Carey versus Piphus theory, this thing would never have been built anyway, that they should not award more than nominal damages.
>
> * * * [I]f the jury returns a verdict in favor of plaintiff in a substantial amount of money, I'm going to have to reconsider your argument as I have, of course, the option to do under Rule 50 and determine whether a reasonable jury could have found what they found.
>
> I'm going to abide that event and see what the jury says.

[DE 114, pp. 500-01. Court directives to jury.]:

Now, before we begin the arguments of counsel, I want to tell you about some of the evidence you've heard which I have now stricken from the record and you are not to consider it. It is a little hard to unring bells, as they say, or unscramble eggs, but you are going to be instructed not to consider several items that * * * you have heard about.

They all involve what I will call the health and safety aspects of this project.

I have stricken from the record Defendant's Exhibits 8 and 9.

(Defendant's Exhibits Nos. 8 and 9 were stricken.)

THE COURT: Those are the two letters from the District of Columbia government to Tri County, October 15 and December 6, 1993, asking for follow-up information and informing them that they would be suspended if they didn't give that information.

I have also stricken some of the testimony you've heard. The testimony of Mr. Sweeney that you heard yesterday about the fact that there were houses 50 to 75 feet away; the testimony of Mr. Sweeney about truck traffic and the noise of truck traffic; the testimony of Mr. Sweeney about his concern that if the trucks came through without covers on them, there would be volatized chemicals; and there was also testimony in the plaintiff's case on that general subject.

You remember Mr. Dishian who testified that this soil contaminated with petroleum

products was no more dangerous than pumping gas? I'm striking that testimony.

There was testimony from several witnesses, Mr. Selzer -- Mr. Selzer right here -- Hampton Cross, and Mr. Sweeney, all testified about whether a transportation plan had been handed to Mr. Cross. That testimony is stricken.

So, ladies and gentlemen, in effect, all * * * of the testimony before you on the health and safety aspects of this project have been stricken from the record because I have determined after hearing all the testimony, as a matter of law, that the permitting process fully considered those issues and resolved them.

So you are not to consider the health and safety issues that have been raised in this case.

JURY INSTRUCTIONS -- EXCERPTS

[DE 114, pp. 539-542]:

On the first question, the law requires that an injured party take all the reasonable steps it can to avoid further injury and reduce its loss. Tri County may not recover damages for any portion of its injury which it could have avoided through the exercise of reasonable care and prudence.

In determining whether plaintiff's conduct was reasonable, you may take into account the evidence concerning the circumstances as they reasonably appeared to Tri County at the time.

The District asserts that Tri County, by failing to pay the $500 fine assessed against it and by failing to appeal the stop work order, is not entitled to any damages.

The burden of proof on this question is on the District of Columbia. If the District of Columbia has not proven by

a preponderance of the evidence that Tri County acted unreasonably in failing to pay the fine or take the appeal, and that the failure to take those specific steps resulted in greater losses than would have been the case if Tri County had paid the fine or taken the appeal, then the District of Columbia has not sustained its burden of proof on this issue, and you must go on to determine the amount of damages that will fairly compensate Tri County for all of its damages to its business or property that were proximately caused by the District of Columbia's conduct. * * *

The law provides that the plaintiff is to be fairly compensated for all damages, if any, to its business or property that were proximately caused by the defendant's conduct.

In this case, the plaintiff has provided detailed evidence of damage amounts, but it is not necessary that the precise amount of plaintiff's damages be proven, particularly if the defendant's wrongdoings have caused any difficulty in determining the precise amount.

You are not bound to accept the figures presented to you, but neither should you speculate in any way about what the damages might have been.

Your evidence must be based on the evidence presented to you and not on guesswork. Your award, if any, should be one that fairly compensates the plaintiff for the damage proximately caused by the District's unlawful suspension of the building permit.

That brings us to the third question you are to determine, which is whether you find that the plaintiff has proven by a preponderance of the evidence that the plaintiff's damages should include lost profits from the business that was planned for the Bryant Street property. And if so, how much those profits would have been.

If you find that because of defendant's wrongful conduct the plaintiff was unable to earn net profits which

would have accrued to it but for the violation, then you may compensate the plaintiff for that loss.

Future profits means net profits. Future profits are determined by subtracting the costs and expenses of a business from its gross revenues. In determining whether or not to award plaintiff damages that include future profits, you may consider the uncertainty which makes the success of a new business problematical, the experience or inexperience of the plaintiff's management in the business it proposed to do, the competition that plaintiff would have had in the relevant geographical area, the success or failure of other like businesses, and any other evidence in the case that in your view bears on the issue.

You may make an award for lost profits only if you find that there is some reasonable basis in the evidence for determining that the plaintiff has, in fact, suffered a loss of profits. You are not to award the plaintiff speculative damages; that is, compensation for future profits which although possible are remote or guesswork.

On the other hand, it is not necessary that the plaintiff shall have proven to an absolute certainty that it would earn profits and how much they would be. It is sufficient if the plaintiff shows by a preponderance of the evidence and to your satisfaction the amount of its lost profits.

[Plaintiff's Exhibit 3]:

GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

December 11, 1992

Glenn D. Selzer, President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

Approval No. 3411

Pursuant to the requirements of Title 20 of the District of Columbia Municipal Regulations (20 DCMR), Subtitle 1, Section 200, approval is hereby granted for the construction and operation of a 25 tons per hour portable soil remediation unit, Model 625/825, including a rotary kiln, a cyclone, a baghouse and an afterburner at 2115 Bryant Street, N.E. in accordance with submitted plans and specifications.

This approval is issued subject to the following conditions:

1. This approval is not valid unless attached to Form BLRA-33, Application for Permits to Construct on Private Property, for the purpose of obtaining a construction permit and until this office receives a copy of the permit issued on the basis of this approval.

2. The approved facility shall be operated solely for testing until the test results demonstrate compliance with applicable requirements of 20 DCMR and thereafter, it shall be operated in accordance with applicable requirements of 20 DCMR and the following permit conditions.

3. There shall not be scheduled any stack emissions testing until this office receives and approves a test protocol.

4. A test report that includes gas flow rates (SCFM), effluent gas particulate loading (gr/dscf), effluent temperature (°F), and supported with laboratory analysis of the effluent gas that shows concentration of volatile organic compounds in milligrams per cubic meter shall be submitted to this office within 48 hours after the test is completed.

5. Representatives of the Environmental Regulation Administration, at any reasonable time, may inspect the facility during and after construction is completed.

6. There shall be no fugitive dust emissions and particulate grain loading shall not exceed three hundredths (0.03) grains per dry standard cubic feet.

7. The total emissions of volatile organic compounds (VOCs) in the afterburner effluent shall be limited to one (1) pound per day.

8. The baghouse shall be operated and maintained as per manufacturer's recommendations and a minimum of 24 extra bags shall be maintained on site for emergencies.

9. The record that includes, but not limited to, operating parameters, baghouse maintenance record, numbers of bags used and on hand, and total tonnage of soil treated shall be kept daily and be made available for inspection when requested.

10. The approved facility shall not be operated to treat hazardous waste materials which include, but not limited to, organic solvents, polychlorinated biphenyls (PCB) polyvinyl chlorides (PVC) but permitted to process only soil contaminated with gasoline, diesel oil, fuel oil or kerosene.

11. Any changes or alterations in the operation of the soil remediation unit must be reported to this office immediately by phone and followed by a letter within five (5) working days stating the reasons.

12. Any violations of applicable air pollution control requirements of 20 DCMR or conditions of permit approval must be reported to this office immediately by phone and followed by a letter within five (5) calendar days describing the nature and duration of the violation, and measures to be taken to prevent future occurrences.

Should there be any questions, please call or write to this office.

Sincerely,
/s/ Modupe A. Babalola
Modupe A. Babalola
Environmental Engineer
Air Resources Management Division
2100 M.L. King, Jr. Avenue, S.E.
Suite #203
Washington, D.C. 20020
Telephone: (202) 404-1180
Fax: (202) 404-1188

[Plaintiff's Exhibit 4]:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

Dec 22 1992

Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Md. 20705

Dear Mr. Selzer:

We have completed our review of the Environmental Impact Screening Form submitted to this office on April 15, 1991, concerning the proposed development of a soil remediation facility at 1911 New York Avenue, N.E., Washington, D.C. This EISF, along with stack test reports, an application for approval to construct and operate a source of air pollution, and other information were used to review the environmental impacts of your current proposed action, now proposed to be constructed at 2115 Bryant Street, N.E., Washington, D.C.

Based on a finding of no significant environmental impact, we have determined that an Environmental Impact Statement for this project will not be required pursuant to the conditions of the District of Columbia Environmental Policy Act of 1989.

Please be advised that even though an Environmental Impact Statement is not required, your project is still governed by all

other applicable District and Federal laws and regulations and will be subject to normal reviews during the permitting and construction processes. Also, construction and operation of the facility will be governed by the special conditions included in Approval No. 3411, issued by the Air Resources Management Division of this Administration on December 11, 1992.

Thank you for your patience during this review process and for your future cooperation. If you have any questions, please contact Mr. James Sweeney, EIS Coordinator, on (202) 404-1136.

Sincerely,

/s/
Ferial S. Bishop
Administrator

cc: Hampton Cross, Administrator, BLRA
Armando Lourenco, PPD

[Plaintiff's Exhibit 44]:

BRYANT STREET FACILITY
SUMMARY OF EXPENDITURES

1.	New Partnership --		$123,800.96
	less rent received		(1,800.00)
2.	Engineering System Consultants, Inc.		80,275.36
3.	Anthony Velazquez, Architect		14,138.90
4.	Wilkes, Artis, Hedrick & Lane, Attorneys		27,684.31
5.	D.C. Treasurer - Permit		2,643.00
6.	General Home Company		47,323.34
7.	Bernard Locraft, Civil Engineer		1,500.00
8.	Va. Sprinkler Co., Inc.		750.00
9.	Bayscale Northern Va.		22,720.00
10.	A.W. Stevens		1,128.28
11.	Pepco		6,451.97
12.	Geotrack		260.00
13.	T.A. Bennett Trucking		68,065.00
14.	TSC Transport		8,617.50
15.	Evered Bardon Mid Atlantic		68,089.05
16.	AR Tool & Equipment		1,652.39
17.	Tri County Industries		
	a) labor	$10,250.41	
	b) fringe benefits	2,875.12	
	c) corporate overhead (25%)	2,562.60	15,691.13
18.	Tri County Industries - officers		
	a) Glenn Selzer	$31,000.00	
	b) fringe benefits	8,680.00	
	c) corporate overhead	7,750.00	47,430,.00
	TOTAL (Entire Project)		**$536,421.19**

[Plaintiff's Exhibit 54; D.E. 17 -- Exhibit A]:

APEX
environmental, inc.

15850 Crabbs Branch Way
Suite 300
Rockville, MD 20855
Telephone (301) 417-0200
Facsimile (301) 975-0169

March 24, 1995

Mr. Frank Emig
7525 Greenway Center Drive
Suite 315
Greenbelt, Maryland 20770

Dear Mr. Emig:

At your request, Apex Environmental, Inc. (APEX) has completed a survey of the Washington, D.C. area market for the low-temperature thermal treatment of petroleum contaminated soils. The purpose of the survey was to establish a baseline for the area with regard to the total tonnage of the soils treated and the gate price per ton for disposal. The baseline was to be established for 1992 through 1994 and projected through the year 2000. The following sections detail the procedures used and the results of this survey.

Survey Procedures

Apex developed a survey questionnaire for distribution to facilities that have accepted petroleum contaminated soils for thermal treatment. Apex mailed the survey questionnaire to facilities that accepted soil from the Washington, D.C. area over the time period in the survey. * * * For the area of the survey, Apex divided the responding facilities into regional

groups. The separate regions were assigned based on proximity to the Washington D.C. area and the actual involvement of the facilities within the Washington metropolitan thermal treatment market. Region 1 includes Virginia facilities located in Richmond or further north. This region was represented by three facilities for most of the survey time and had extensive involvement in the Washington market. Region 2 includes facilities located in Maryland and includes two facilities that had extensive involvement in the market. Region 3 includes Virginia south of Richmond and North Carolina. The survey includes responses from three facilities which had relatively little involvement in the Washington, D.C. market.

As will be seen from the survey results, Region 1 facilities contributed the largest volume of treated soil to the results. This occurred based on the specific regulations in Virginia and Washington, D.C. which were more strict than those in Maryland with regards to the amount of contaminated soil to be excavated. The Virginia and Washington D.C. regulatory communities required, much more often than the Maryland regulators, the excavation and treatment of contaminated soil. Additionally, Virginia has a much more accessible reimbursement program whereby responsible parties who incur costs for the cleanup of their property can, with the state's agreement, obtain reimbursement from the state for a large portion of their costs. These factors combined to produce a market that was dominated by contaminated soils excavated within Virginia and Washington, D.C.

Survey Results * * *

Region 1

This region represents the most active region for the disposal of petroleum contaminated soils from the Washington, D.C. market. For most of the survey period, this region included three facilities. Transportation costs for this region ranged from a low value of $6.00 per ton to $12.00 per ton for the facility located farthest from the market.

Year	* * *	Total Tonnage All Facilities	* * *	Average Cost Per Ton ($)
1992	* * *	217,500-297,500	* * *	42.68-55.33
1993	* * *	303,099-383,099	* * *	37.83-50.50
1994	* * *	160,000-250,000	* * *	31.00-47.00
		Projected		
1995	* * *	300,000	* * *	34.00-45.00
1996	* * *	300,000	* * *	34.00-45.00
1997	* * *	400,000	* * *	34.00-45.00
1998	* * *	450,000	* * *	34.00-45.00
1999	* * *	300,000	* * *	34.00-45.00
2000	* * *	300,000	* * *	34.00-45.00

Region 2

This region includes responding facilities located in Maryland and represents the second largest provider of services to the Washington, D.C. market. Apex is aware of one facility in the region which has been active in the market but did not respond. The region included two responding facilities for the term of the survey. Transportation costs for the two facilities that responded to the survey ranged from $6.00 to $11.00.

Year		Total Tonnage All Facilities		Average Cost Per Ton ($)
1992	* * *	93,616	* * *	38.50-58.50
1993	* * *	94,491	* * *	34.00-54.00
1994	* * *	91,950	* * *	44.00-54.00
		Projected		
1995	* * *	90,000	* * *	34.00-44.00
1996	* * *	90,000	* * *	34.00-44.00
1997	* * *	120,000	* * *	34.00-44.00
1998	* * *	120,000	* * *	34.00-44.00
1999	* * *	90,000	* * *	34.00-44.00
2000	* * *	90,000	* * *	34.00-44.00

* * *

Projection

The market has undergone significant change over the past three years. While tonnages for regions have remained relatively constant, the treatment totals for various facilities have fluctuated. In 1994 the market saw an increase in the number of facilities, both existing and new, that provided bioremediation of petroleum contaminated soil as opposed to thermal treatment. This process involves the application of microorganisms and fertilizers to contaminated soil stockpiled at permitted facilities. The active microorganisms break down the petroleum hydrocarbons in the soils to reduce the contaminant levels. Additionally, some of the regions have seen an influx of facilities that provide "cold batch" treatment of contaminated media. This process involves cold mixing of contaminated soils into cold batch asphalt. This process does not destroy the contaminants, merely immobilizes them within an asphalt mixture. Both of these processes are expected to

remain active within the market place but are not expected to significantly reduce the tonnage of soil treated through thermal methods.

Total tonnage projections reflect in [sic] increase between 1997 and 1998. This increase is anticipated to occur as a direct result of the requirement for most existing USTs to be upgraded or replaced by December 22, 1998. There is anticipated to be a large number of USTs that will be so affected. Coupled with the increased level of UST work in the market place should be a commensurate increase in the amount of petroleum contaminated soil required for disposal.

Price structures are projected to remain stable throughout the time frame. This is based on the observation that soil prices have dropped to the lowest point to allow for the facilities to cover operating costs. In fact, one facility located in Region 2 attempted to gain a larger portion of the market by reducing gate prices below cost. The result was that the facility had to be sold at a loss to its lenders, as it could no longer make payment on incurred debt.

Summary and Conclusions

Apex's past experience and the results of this survey indicate a strong market place for thermal treatment of petroleum contaminated soils. The market tonnages have been stable over the survey period and are projected to remain stable or increase slightly. Cost structures for gate prices per ton have fallen slightly over the survey period, but are projected to have reached bottom based on Apex's experience and our survey results.

Overall, it is Apex's opinion that the projected tonnage and cost values are conservative. The market for the thermal

treatment of contaminated soil is fairly stable. If a facility had been able to operate a thermal treatment unit within Washington, D.C. during the time frame of the survey, it would have been very well placed to have captured a significant portion of the market. The proximity of the facility with respect to the sites where contaminated soils were being excavated would have been much better than all of the responding facilities. Additionally, a facility in Washington, D.C. would have much reduced transportation costs as opposed to the other facilities. In fact, transportation costs would have been approximately $2.00 to $3.00 per ton. This figure would give the Washington facility an advantage over the other regional facilities and would allow the Washington facility to charge a higher gate price while remaining cost competitive. As such, it is Apex's opinion that the facility in Washington could have charged $4.00 to $7.00 more at the gate than its competition and remain cost competitive. Therefore, for the time frame of the study, a facility located in Washington could have charged $32.00 to $40.00 per ton at the gate for contaminated soil.

Apex is pleased to have had the opportunity to perform these services. If you have any questions or comments, please call.

Sincerely,
/s/ Vincent N. DiRenzo, Jr.
Vincent N. DiRenzo, Jr.
Director, Environmental Services

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 644 P06

10/31/97 01:38 JOEL N MORSE → 301 345 6975

TRI COUNTY DAMAGE SPREADSHEET

This appendix accompanies my text report. If new testimony emerges near and during trial, these calculations may be modified.

This analysis assumes that trial will occur in January 1998.

	1994	1995	1996	1997	1998	1999	2000
REVENUES	$3,367,500	$3,202,500	$2,955,000	$2,707,500	$2,707,500	$2,707,500	$2,707,500
LESS COSTS	$1,335,908	$1,250,097	$1,260,180	$1,270,514	$1,293,557	$1,317,176	$1,341,386
EQUALS NET PRE-TAX INCOME (Each Year)	$2,031,592	$1,952,403	$1,694,820	$1,436,986	$1,413,943	$1,390,324	$1,366,114
Pres Value of Income Each Year)	$2,469,413	$2,260,150	$1,868,539	$1,508,835	$1,413,943	$1,158,603	$948,690
CUMULATIVE TOTALS (I.e., Damage Estimates)							
Not discounted to Present Value	$2,031,592	$3,983,995	$5,678,815	$7,115,801	$8,529,744	$9,920,067	$11,288,182
Discounted to Present Value	$2,469,413	$4,729,563	$6,598,102	$8,106,937	$9,520,880	$10,679,483	$11,628,174

Discount rate

20% For future lost profits (1998-2000)

5% Interest for delayed receipt of funds(1994 through 1997)

[Plaintiff's Exhibit 56]:

Revenues

Revenues :	1994	1995	1996	1997	1998	1999	2000
75,000 tons of soil	$3,000,000	$2,850,000	$2,625,000	$2,400,000	$2,400,000	$2,400,000	$2,400,000
7,500 tons	$277,500	$262,500	$240,000	$217,500	$217,500	$217,500	$217,500
45,000 tons cl soil	$90,000	$90,000	$90,000	$90,000	$90,000	$90,000	$90,000
TOTAL REVENUES	$3,367,500	$3,202,500	$2,955,000	$2,707,500	$2,707,500	$2,707,500	$2,707,500

NO. 644 P07
10/31/97 01:39 JOEL N MORSE - 301 345 0975

Costs

Costs (inflation is assumed to be 5% for costs):

		1994	1995	1996	1997	1998	1999	2000
1	Plant Operator/Supervisor	$50,000	$51,250	$52,531	$53,845	$55,191	$56,570	$57,985
2	Assistant Supervisor	$30,000	$30,750	$31,519	$32,307	$33,114	$33,942	$34,791
3	Laborers(2@$7.00/hr)	$29,120	$29,848	$30,594	$31,359	$32,143	$32,947	$33,770
4	Loader/Operator	$49,920	$51,168	$52,447	$53,758	$55,102	$56,480	$57,892
5	Fringe Benefits(28.05%)	$44,611	$45,726	$46,869	$48,041	$49,242	$50,473	$51,735
6	Utilities	$584,854	$498,007	$498,007	$498,007	$510,457	$523,219	$536,299
7	Equipment Repairs	$18,000	$18,460	$18,911	$19,384	$19,869	$20,365	$20,874
8	Corp Overhead	$31,808	$32,603	$33,418	$34,254	$35,110	$35,988	$36,888
9	Equipment (SRU)	$139,915	$139,915	$139,915	$139,915	$139,915	$139,915	$139,915
10	Land -Capital Costs	$174,000	$165,200	$165,200	$165,200	$165,200	$165,200	$165,200
11	Real Estate Taxes	$22,000	$22,550	$23,114	$23,692	$24,284	$24,891	$25,513
12	Personal Property Taxes	$22,000	$22,550	$23,114	$23,692	$24,284	$24,891	$25,513
13	Insurance	$13,500	$13,838	$14,183	$14,538	$14,901	$15,274	$15,656
14	Trucking to facility	$82,500	$84,563	$86,677	$88,843	$91,065	$93,341	$95,675
15	Lab Tests(312x4x$35)	$43,680	$43,680	$43,680	$43,680	$43,680	$43,680	$43,680
TOTAL COSTS		$1,335,908	$1,250,097	$1,260,180	$1,270,514	$1,293,557	$1,317,176	$1,341,386

SRU Cost	Interest Rate-SRU
$600,000	14.00%
Land Cost	**Interest Rate-Land**
$1,400,000	11.80%

(SRU means "soil remediation unit")

INFLATION ASSUMPTION=	2.50%
INFLATION MULTIPLIER=	1.025

10/31/97 01:39 JOEL N MORSE → 301 345 0975 NO. 644 P08

10/31/97 01:48 JOEL N MORSE → 301 345 0975 NO. 644 009

Note: 2 at $12/hr.

Note: Gas, electric and water

Note: The costs for utilities are based on the report of Carter Engineering, Inc. Installation costs are $86,846 (one time only). I use $584,854 for 1994 . In 1995 through 1997, I use, per Carter, in $498,007.

Note: 20% of Items 1-4

Note: I believe that my analysis is conservative, because I have assumed a zero salvage value for the SRU. If salvage value were higher than zero, there would be a positive residual at the end of the planning horizon,which would reduce costs.

Note: I have assumed lease payments of 12 months at $14,500 for 1994.

Note: I have assumed that (in the beginning of 1995) the land on Bryant St. was purchased for the amount in cell B26. I have assumed that it was sold for the same price, in real terms, at the end of the year 2000. I have charged, as a cost, 11.8% interest.

Note: I assume that the land is purchased in 1995, and sold at the end of 2000. No profit or loss is assumed on the land transaction.

[Plaintiff's Exhibit 57]:

THE NEW PARTNERSHIP

August 17, 1993

Mr. Glen Selzer
Tri-County
P.O. Box 1467
Baltimore, Maryland 20705

Subject: Tax Bill for 2115 Bryant Street

Dear Glen:

Enclosed is the tax bill for 2115 Bryant Street for one-half year. This bill must be paid by September 15, 1993 to avoid penalties.

Lot 001S	648.06	648.06
Lot 0007	379.00	649.00
Lot 0016	340.93	340.93
Lot 0805	308.90	308.90
Lot 0078	10,487.75*	8,692.27*
		10,369.96

*27,857 square feet not leased to Tri-County

600 square feet x 27.837 = 167,022
167,022/ 2.15 = 3,590.97
3,590.97/ 1/2 year = 1,795.48

10,487.75
-1,795.48
$8,692.27

Please send me a check for $10,369.96.

Thank you.

/s/ *Walter M. Prichard*
Walter M. Prichard
General Partner
The New Partnership

WMP/dmp
Enclosures

5300 BEECH PLACE, TEMPLE HILLS, MD 20748
(301) 422-1900

[Defendants' Exhibit 8]:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
ENVIRONMENTAL REGULATION ADMINISTRATION
2100 MARTIN LUTHER KING, JR. AVENUE, S.E.
WASHINGTON, D.C. 20020-5732

* * *

15 OCT 1993

Mr. Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

Dear Mr. Selzer:

As you are well aware, at a community meeting held at the Washington Center for Aging Services, at 2601 18th Street, N.E., Washington, D.C., on Monday, September 20, 1993, Mr. Hampton Cross, Acting Director of the Department of Consumer and Regulatory Affairs, stated that he was suspending the permit for construction of Tri-County's proposed soil remediation facility at 2115 Bryant Street, N.E. Mr. Cross's statement was based on new information which was brought to light at the meeting concerning the ultimate use of property which is adjacent to your site. This property has been proposed for a low-to-moderate income housing project by the D.C. Department of Housing and Community Development.

In light of this new information, we have determined that further review is necessary in order to determine what the potential environmental impacts from your proposed facility on the adjacent property will be. Therefore, pursuant to

Section 4(c)(3)(C) of the District of Columbia Environmental Policy Act of 1989, you are directed to supply the following information:

1. The total cost of your proposed project, including the costs of the soil remediation equipment to be installed, the costs of construction materials and labor costs for both construction and installation of equipment;

2. The expected amount of soils in tons, both maximum and average, to be processed per day at the facility;

3. The number of truck trips into and out of the facility per day, for both maximum and average loads;

4. The proposed routes of trucks through the neighborhood into and out of the facility;

5. The proposed hours of operation of the facility;

6. Current conditions of the facility property regarding pest infestation (rodent and insect), dust and odor;

7. Contingency plans, if any, for the control of pests, dust and odor;

8. Proposed means of the washing of the facility and methods for disposing of wash water and cleaning materials;

8. The distance of the facility from the adjacent property proposed for development. This distance should be measured from your property line to the property line of the adjacent property; from truck entrances and exits to the adjacent property line; and from the smokestack of soil remediation equipment to the adjacent property line;

9. The distance of the facility from other currently occupied properties near the facility, both industrial and residential. These distances should also be measured as in No. 8 above; and

10. Any information on alternative sites which might be suitable for your proposed facility.

Thank you for your timely submittal of this information. If you have any questions, please contact me on 202-404-1136.

Sincerely,

Donald E. Wamsgans II
for Ferial S. Bishop
Administrator

cc: Hampton Cross, Acting Director, DCRA

[Defendants' Exhibit 9]:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE DIRECTOR

* * *

DEC 6 1993

Mr. Glenn D. Selzer
President
Tri-County Industries, Inc.
P.O. Box 1467
Beltsville, Maryland 20705

Dear Mr. Selzer:

This is to inform you that the Department of Consumer and Regulatory Affairs has rescinded its original environmental approval, dated December 22, 1992, for the proposed Tri-County Industries soil remediation facility at 2115 Bryant Street, N.E., Washington, D.C.

By letter, dated October 15, 1993, you were directed to provide certain specific information, pursuant to Section 4(c)(3)(c) of the District of Columbia Environmental Policy Act, concerning the potential environmental impacts of your posed [sic] project on a proposed low-to-moderate income housing project sponsored by the District's Department of Housing and Community Development (DHCD). As of this date, you have not responded to this directive.

Section 4(c)(3)(c) requires that an applicant provide to the District, at any time during the review process, all relevant information concerning the impact, costs, benefits and alternatives to the project, in order to assist in determining the

environmental impacts of the project if the information has not been submitted in a timely manner. Your failure to respond to the October 15, 1993 letter constitutes grounds for disapproval of the project.

Furthermore, the original environmental approval was based on information provided by you on the Environmental Impact Screening Form stating that your facility would be over 700 feet from the nearest residential house. You failed to bring to our attention the fact that there is a single family residence directly across the street from your facility, less than 100 feet away. We are concerned that this home, as well as the proposed DHCD housing project, are much too close to your facility to not be impacted by the emissions from the treatment process and potential emissions from contaminated soil stored at the facility or transported through the neighborhood.

Since it is the mission of this department to protect the health, safety and welfare of the citizens of the District of Columbia, environmental approval for your proposed project is hereby denied based on your failure to respond to our October 15, 1993 directive letter and on likely significant adverse environmental impacts on nearby homes.

Because the environmental approval was one of the criteria for the issuance of the work permit for the construction and alteration at 2115 Bryant Street, N.E., the Acting Administrator of the Building and Land Regulation Administration will be sending you a Notice of Intent to Revoke Permit, with the requisite charges and specifications and hearing procedures. That Notice will be served on you by Friday, December 10, 1993.

Also, you are directed to remove <u>immediately</u> and to dispose of properly, the contaminated soil which is currently stored

inside your facility. The presence of the soil on the site constitutes operating without a certificate of occupancy.

If you have any questions regarding this letter, please contact Miriam Helen Jones, Esq., Enforcement Officer, on 727-7770.

Sincerely,
/s/ Hampton Cross
Hampton Cross
Acting Administrator

cc: Patricia Montgomery
Acting Administrator
Building and Land Regulation Administration

Ferial Bishop
Administrator
Environmental Regulation Administration